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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~342~~. 75

L. N. YOUNG, M. W. YOUNG, J. M. YOUNG, H. SLACK, AND A. DIX, HEIRS AT LAW OF J. D. YOUNG, DECEASED, J. N. CLARKSON AND THOMAS B. SWANN, APPELLANTS,

vs.

E. B. KNIGHT, ADMINISTRATOR OF MILTON PARKER, DECEASED.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED SEPTEMBER 14, 1886.

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1 Pleas before the Honorable John J. Jackson, judge of the district court of the United States for the district of West Virginia, held at Charleston on Wednesday, the 12th day of December, A. D. 1885, and in the 110th year of the Independence of the United States of America.

Be it remembered that heretofore, to wit, at a district court of the United States for the district of West Virginia, held at Charleston on Monday, the 22nd day of April, A. D. 1872.

This day John Hussey & Co., who were made def'ts in this cause by petition and on whose motion this cause was transferred to this court from the circuit court of Kanawha county, moved the court to docket the cause here; which motion is now docketed.

2 And at another day, to wit, at a district court of the United States for the district of West Virginia, held as aforesaid on Friday, the 26th day of April, A. D. 1872.

C. G. Hussey & Co., who are defendants in this suit and plaintiffs in a bill of review filed in the same, offered on the first day of this term and moved to docket this cause in this court; and also came Carr, McCandless & Co., by their attorneys, and waived the production of the record on that day; and now, on this 26th day of April, 1872, came the said Hussey & Co. and the said Carr, McCandless & Co., by their attorneys, and the said C. G. Hussey & Co. filed the record in this cause, required by the act of Congress, to remove this cause from the circuit court of Kanawha county into this court; and on motion of the said C. G. Hussey & Co. it is ordered that this cause be docketed in this court.

3 The record referred to in the order last aforesaid is in the words and figures following, to wit:

4 *Record.*

STATE OF WEST VIRGINIA, *sct:*

Pleas and proceedings in chancery in the circuit court of the county of Kanawha before the Honorable James W. Hoge, judge of the circuit — of said State, at the court-house of the said county, on Tuesday, the fifth day of January, in the year 1869, and in the — year of the State.

Be it remembered that heretofore, to wit, at rules held in the clerk's office of the said court in the month of December, in the year 1865, came Milton Parker, by his counsel, and filed his bill of complaint in the words and figures following, to wit:

5 *Bill.*

The bill of complaint of Milton Parker, filed in the circuit court of Kanawha county, against John N. Clarkson, David J. W. Clarkson, Jubal Early, trustee, &c., Samuel H. Early and wife, Andrew Crookshanks, James W. Ogburn, John G. Newman, William W.

Newman, Samuel A. Miller, John R. Johnson, Frederick N. Reed' Nicholas Fitzhugh, Charles Hedrick; James M. Laidley, Fayette W. Lovell, commissioner, &c., Isaac Reed, William A. Quarrier, William Hedrick, and Anthony Lawson and others.

To the Hon. David Polsley, judge of said court:

Humbly complaining, showeth unto your honor your orator, Milton Parker, that he recovered a judgment for $1,486.76, with interest thereon from the 10th June, 1851, at the fall term, 1851, of the Kanawha circuit court, and docketed 14th June, 1852, a transcript whereof is herewith filed, marked A, and prayed to be taken as part of this bill, subject to a credit for $943.34, paid 22d January, 1855; that at spring term of said court he also recovered a
6 judgment against said J. N. Clarkson for $484.70, with interest thereon from the — day of ——, 185–, until paid, and costs, on which judgment a forthcoming bond was given and an execution awarded thereon against said J. N. Clarkson and D. J. W. Clarkson, his security, a transcript of which latter judgment is herewith filed, marked B, and prayed to be taken as part of this bill, each of which judgments *were* duly recorded; that your orator, for whose benefit James W. Ogbourne sued in said court, recovered a further judgment against said J. N. Clarkson, by confession, 5th July, 1852, in Kanawha county court, for $400, with interest from 1st January, 1850, and costs, $11.77, duly docketed 5th July, 1852, a transcript whereof is herewith filed, marked C, and prayed to be taken as part of this bill, which judgment was duly recorded July 5th, 1852; that at the November term of said county court for the year 1857, on *scire facias*, judgment was confessed in last-named case for the sum of $200, with interest from 1st July, 1856, and costs, $5 97, docketed
7 within a year thereafter.

That your orator, in the name of Andrew Crookshanks, for his benefit, obtained an award of execution on forthcoming bond against said J. N. Clarkson, at the fall term of said circuit court, 1857, and David J. W. Clarkson, his security, for the penalty of the bond to be discharged by the payment of $80.04, with interest from 18th August, 1857, and costs, $3.22, and duly docketed in time.

That your orator, by suit in the name of William Hedrick, obtained an award of execution on forthcoming bond against said John N. Clarkson and said David J. W. Clarkson, his security, in said circuit court, at fall term, 1857, for the penalty of the bond to be discharged by the payment of $424.66, with interest from the 10th of August, 1857, and $3.22 costs. This judgment as well as the original *were* each duly docketed. Your orator files herewith an abstract of these judgments on forthcoming bond and one on *scire facias*, in addition to the exhibits before filed, marked D, and prayed to be
8 taken as parts of this bill. He will also file abstracts of the original judgments not hereinbefore filed, and prays that when filed may be taken as parts of this bill.

Your orator avers that said John N. Clarkson has title to various tracts of land, to wit, two tracts of land conveyed to him by said Sam'l H. Early and wife and Jubal A. Early, as trustee, &c., by deed

dated the 10th day of April, 1855, and duly recorded, &c., and herewith exhibited, marked E, and prayed to be taken as part of this bill; that on the said 10th day of April, 1855, the said John N. Clarkson gave a deed of trust on the same two tracts of land to Isaac Read and William A. Quarrier, as trustees, to secure the payment of $9,600 at three equal instalments, at one, two, and three years from the date of said trust deed, which is herewith exhibited, marked F, and prayed to be taken as part of this bill. Your orator avers that the said $9,600 was the unpaid portion of the purchase-money, and
9 that the same and each part thereof hath been paid by said John N. Clarkson to said Jubal A. Early or to his order, and that said two tracts of land *is* unincumbered as to said purchase-money.

Your orator further states that the said John N. Clarkson purchased, at a public sale at the court-house of Kanawha county, as the property of E. V. Cox and the heirs of Wil. R. Cox, deceased, or a portion of them,— containing 120 acres, more or less, adjoining the town of Charleston; that the said John N. Clarkson resided on said land some four years, more or less, after his purchase; that, having failed to pay the purchase-money, a resale thereof was made in June last under an order in this court for the residue of the purchase-money; that at the sale aforesaid the said 120 acres brought $19,350 and four or five thousand dollars over the residue of the purchase-money, sold under decree of the circuit court of Kanawha county in the case of Carrick's Administrator against Warth and
10 English and others, a copy of which deed is herewith exhibited, marked H, and prayed to be taken as part of this bill; that the said Moseley departed this life in the fall of 1860 or spring of 1861; that Fayette A. Lovell, Esq., was the substituted commissioner who resold the said 120 acres of land aforesaid, and who has the collection of the surplus aforesaid, and when paid to him will have to disburse the same as ordered by this court. Your orator desires that the same may be paid by said Lovell to the credit of this suit; that the said John N. Clarkson claims title and really owns the Allen tract of land and salt works conveyed by the trust deeds aforesaid exhibited, marked G and H; that a portion thereof (one-third) has been exposed to sale for the dower right of Mrs. Sybill Allen, wife of Brayton Allen, the vendor of said Clarkson of said land, and purchased by her at said sale; that there is a deed of trust, as your orator is informed, on said land, subject to the dower aforesaid, to secure a debt due to Anthony Lawson; that
11 the defendant, Charles Hedrick, one of the commissioners aforesaid, who sold the land to said John N. Clarkson and took bond as aforesaid, with Johnston and Miller as sureties, resold the same land in the case of Carrick's Administrator against Warth and English and others in this court; that whether said resale was sufficient to pay the purchase-money due from said John N. Clarkson and his securities, Johnston and Miller, he is not advised, but alleges that the trust deed given to indemnify said Johnston and Miller is not binding and valid for any greater sum than such deficiency. The precise surplus will be ascertained by reference to the proceedings in

this court in the cause in which said sale was ordered, which amount, whatever it may be, is subject to the judgments aforesaid of your orator, if not liable for other prior liens.

Your orator further states that by trust deed dated the 3d of October, 1857, the said John N. Clarkson conveyed, with other
12 lands and a number of negroes, the said 120 acres of land to William W. Newman, in trust, to secure to John G. Newman three single bills of even date with the deeds last aforesaid, with interest from date, two of which were for $1,000 each and the other for $1,500, and all at one year from date, a copy of which trust deed is herewith exhibited, marked G, and prayed to be taken as part of this bill.

Your orator avers that said single bills have been paid and satisfied, and that they constitute no lien on said surplus arising from said sales; that the negroes named and conveyed in said trust deed, of greatly more value than the debt secured by said deed, were carried out of the county of Kanawha, Virginia, by said John N. Clarkson, and out of the State of West Virginia by the knowledge, consent, and approval of said trustee, W. W. Newman, and of the said John G. Newman, the two latter going with—or about the same time—said negroes, and that the said
13 W. W. Newman, John G. Newman, John N. Clarkson, and the negroes aforesaid are still absent and beyond the jurisdiction of this court; that by such removal of the negroes, with the assent aforesaid, the said John G. Newman, even if said single bills were unpaid, has forfeited all right to be secured by the said surplus or any other lands conveyed by said last-named trust deed.

Your orator further avers that said John N. Clarkson, by deed dated the 16th day of November, 1857, conveyed said 120 acres of land to Frederick N. Read and John L. Moseley, in trust, to secure Samuel A. Miller and John H. Johnston as his securities in three bonds, each for the sum of two thousand two hundred and thirty-three and a third dollars, payable, at nine, sixteen, and twenty-four months from the 14th November, 1857, their date, with interest from date, to Nicholas Fitzhugh, Charles Hedrick, and James M. Laidley, commissioners, and given for the purchase-money of a tract of land.

14 Your orator further prays that said Hedrick may be required to report and show to this court, by answers or otherwise, how far the said bonds are repaid by said resale, and if — any deficiency for which said Miller and Johnston may be liable that he, the said Hedrick, show the precise deficiency and the time from which it bears interest; that such deficiency, if it exists, is due to the fund in the case of Carrick's Administrator against Warth and English and others.

Your orator further alleges that subsequent to the two judgments before named for $1,486.76 and $400.00, respectively (the latter judgment obtained in the name of James Ogbourne for the use and benefit of your orator aforesaid), the said John N. Clarkson executed a deed of trust to one John J. Williams as trustee, conveying large real and personal property to secure certain creditors therein enumerated,

and your orator's said judgments last named are among those
15 enumerated and secured by said deed, a copy of which is herewith filed, marked No. 1, and prayed to be read as part of this bill.

Your orator would further state that since the execution of said trust deed from Clarkson to Williams John J. Williams, the trustee named therein, has removed from the State and is now residing, as your orator is informed, in the State of California. Your orator has been informed and so charges that much the larger portion of the debts chargeable on the property conveyed in the deed mentioned has been paid off and discharged, but not only has such not been the case with your orator, but by the removal of the trustee Williams from the State he has been debarred from the means of obtaining payment of his debts from said Clarkson by a sale under the trust deed aforesaid.

Your orator further alleges that subsequent to the execution of said deed of trust by said Clarkson said Clarkson conveyed
16 the property described in said deed of trust as a lot or parcel of land lying and being in the county of Kanawha, in the town of Charleston, estimated to contain one and three-fourths of an acre, and being the same lot which was conveyed by Van B. Donnally and Mary, his wife, to the said John N. Clarkson by deed bearing date the 5th day of November, 1851, to Thomas B. Swann, and said Swann afterwards conveyed the same property to Ezekiel Mayes, and Ezekiel Mayes afterwards conveyed the same property to John D. Young, copies of which deed- from Clarkson to Swann and from Swann to Mayes and from Mayes to Young are herewith filed, marked Nos. 2 and 3, 6 and 7, respectively, and prayed to be read as parts of this bill.

Your orator further alleges that subsequent to the execution of the deed of trust aforesaid said John N. Clarkson conveyed the property described in said trust deed as purchased by him of
17 James M. Laidley and Ann, his wife, by deed bearing date on the 6th day of September, 1851, and of William Hedrick and Mattie, his wife; Elizabeth Cox, and Sarah Cox, wife of Charles A. Cox, by deed bearing date the 10th day of May, 1851, to Daniel Ruffner, and said Daniel Ruffner afterwards conveyed the same property to George Jeffries, copies of which deeds from Clarkson to Ruffner and from Ruffner to Jeffries are herewith filed, marked Nos. 4 and 5, respectively, and prayed to be taken as part- of this bill.

Your orator further alleges that said conveyances of the property described in said trust deed, being subsequent to the execution of said trust deed, are wholly inoperative and void, so far as they affect the liens created by the same.

Your orator further alleges that the Allen tract of land and salt works before mentioned in this bill of complaint are also embraced in the aforesaid deed of trust given by said John N. Clarkson to secure the payment to John J. Williams, trustee, and that said trust deed, as your orator believes and so asserts, constitutes
18 the first lien on the Allen property aforesaid, excepting so much thereof as has been sold for the widow's dower.

Your orator desires that the aforesaid several tracts of land embraced in the before-named trust deed, Exhibit No. 1, given as aforesaid to secure the two judgments of your orator, with other claims, may also be sold, except the widow's dower before named in the last-mentioned tract, and the proceeds thereof, or so much as may be necessary, appropriated to the satisfaction of your orator's two judgments named in said trust deed and of his other judgments before mentioned.

Now, your orator is advised that his remedy in the premises is properly in a court of equity, and would therefore pray that the defendants named in the caption to this bill may be made parties defendant to this suit, and also that the said Thomas B. Swann, Ezekiel W. Mayes, John D. Young, Daniel Ruffner, George Jeffries, Sybil Allen, John J. Williams, trustee as aforesaid, and
19 the several creditors named in the said trust deed, to wit, David J. W. Clarkson, James M. Laidley, Caroline W. Quarrier, administratrix of Alexander W. Quarrier, deceased; Bayles G. Early, James E. Ogburn, Francis Thompson, Benjamin S. Thomson, Jacob Goshorn, Henry H. Wood, Augusta Pack, Rachael M. Tompkins, executrix of Wm. Tompkins, deceased; William Hedrick, James Vickers, William Gillison, Charles Hedrick, administrator of Samuel J. Cabell, deceased; Davis H. Estill, James W. Hoge, administrator of John G. Wright, deceased; John P. Sibrell, John P. Anderson, Squire Jarrett, Charles Cavender, —— ——, administrator of Lewis E. Vintroux, deceased; —— ——, administrator of George P. Huddleston; John R. Smith, Catharine G. Welch, and Frederick Walker, partners under the firm name of Smith, Walker & Co.; Henry H. Wood and Moses Nester, surviving partners of Henry H. Wood & Co.; —— ——, administrator of Robert Holderly; James Paull, executor of James W. Fry, deceased; John D. Crockett, George Rogers, administrator of John Capehart, deceased;
20 Enos S. Arnold and William J. Rand, firm of Arnold & Rand; Asa Amick, John Smith, George W. Summers, of the firm of Syle, Millan & Co.; Alexander G. Clarke, Samuel Price, R. W. Clarkson, administrator of James Clarkson, deceased; Isaac Read, the administrator of Martin P. Brooks, deceased; Thomas Ellis and Charles Ellis, George Mayes, Ira Hart, Conway Spillman, Isaac Parker, of the firm of Vintroux & Parker; Robert A. Thompson, John and Joseph H. Rogers, firm of Rogers & Brothers; Washington Chamberlain, Francis P. Nash, Thomas Trunbull and Edward Trunbull, R. R. Humphreys & Co., James Jones, and John B. Shirky, administrator of John C. Matheny, deceased, may be made parties defendant to this bill, and that all the defendants aforesaid and each of them be required to answer this bill and each and every allegation thereof upon their several corporal oaths, and also each and every one of the above-named defendants who are mentioned and secured in the aforesaid deed of trust be required
21 to answer and say on their respective oaths whether their several claims against the said Clarkson have been paid off or not; and, if not, how much, if any, has been paid thereon and what is still due.

Your orator would further pray that inasmuch as the said John J. Williams has removed from the State that your honor will substitute in his place a suitable and discreet person as trustee in said deed; that an account may be taken by a master commissioner of this court to show what payment and how much have been made on the debts secured by the trust deed aforesaid and what is still due; that the lands conveyed by said trust deed, with the exception of the widow's dower in the Allen trust aforesaid, may be subjected to sale, as well as all the other lands and property of the said John N. Clarkson within the jurisdiction of the court, and the proceeds thereof, as well as the surplus funds aforesaid of said Clarkson, or so much as may be necessary, appropriated to pay your orator's
22 claim aforesaid, and that your orator may have such other and further relief and decree in the premises as to your honor may seem meet and proper; and as in duty bound your orator will ever pray, &c.

MILTON PARKER,
By SMITH & KNIGHT, *Sol's.*

The exhibits referred to in the foregoing bill are as follows:

EXHIBIT No. 1.

"This deed, made this 14th day of August, in the year 1852, between John N. Clarkson, of the one part, and John J. Williams, of the other part, witnesseth:

That the said John N. Clarkson doth grant unto the said John J. Williams the following property, to wit: All that tract or parcel of land lying and being in the county of Kanawha, together with the tenements and premises thereunto belonging, which was conveyed unto the said John N. Clarkson by George W. Summers, trustee, &c., by deed bearing date on the 10th day of September, 1851, and of record in the clerk's
23 office of the county of Kanawha, to which reference is made for more particular description; and also a certain lot or parcel of land lying and being in the said county of Kanawha and in the town of Charleston, estimated to contain one and three-fourths of an acre, being the same lot which was conveyed by Van B. Donnally and Mary B., his wife, to the said John N. Clarkson by deed bearing date on the 5th day of November, 1851, and of record in the clerk's office of the county court of Kanawha, to which reference is made for more particular description; and also certain lots or parcels of land lying and being in the county aforesaid, upon which the said Clarkson now resides, and being the same land which was conveyed to him by James M. Laidley and Ann M., his wife, by deed bearing date on the 6th day of September, 1851, and of record in the clerk's office of the county of Kanawha, to which refer-
24 ence is made for more particular description; and also five lots or parcels of land lying and being back of the town of Charleston, in the county of Kanawha, being the same land that was conveyed to the said John N. Clarkson by William Hedrick and Mattie S., his wife; Elizabeth V. Cox and Sarah Cox, wife of

Charles A. Cox, by deed bearing date the 10th day of May, 1851, and of record in the clerk's office of Kanawha county, to which deed reference is made for more particular description * * *

In trust to secure the following debts and to indemnify the following acceptors, endorsers, and securities: * * *

A debt due James Clarkson of $7,000 by note dated 6th day of January, 1848, payable five years after date, with interest from date. * * *

Now, if the said John N. Clarkson shall well and truly pay the above-secured debts and save harmless the above-mentioned
25 endorsers, acceptors, and securities within three months from this time, then this deed shall be void; but if all or any of said debts shall remain unpaid, or any of the said endorsers, acceptors, or securities, after the lapse of three years from this date be not indemnified and saved harmless, then the trustee shall proceed to sell according to the terms of the sixth section of chapter 117 of the Code of Virginia. The said John N. Clarkson doth covenant and agree to warrant generally the property herein conveyed, and it is understood that the said John N. Clarkson shall retain the possession of the property, both real and personal, herein conveyed until default be made herein and the property be required for sale; and it is further agreed and understood that the said John J. Williams may at any time, with the consent of the said Clarkson given in writing, sell any or all of the property herein conveyed at private sale, but he shall apply the proceeds of such sale to the payment of the debts herein secured and to the indemnity of the
26 endorsers, acceptors, or securities as may have paid any portion of the moneys for which they are respectively liable *pro rata*.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

JOHN N. CLARKSON. [SEAL.]
JOHN J. WILLIAMS. [SEAL.]

KANAWHA COUNTY COURT CLERK'S OFFICE,
August 14th, 1852.

This deed was this day presented to me and duly acknowledged by John N. Clarkson and John J. Williams, parties thereto, and was so acknowledged after another deed of trust executed by said Clarkson to John J. Williams partly on same property conveyed by this deed, and is thereupon admitted to record.

Teste: JOHN DRYDEN, *Dep.*,
For A. W. QUARRIER, *Clerk.*"

EXHIBIT.

Clarkson to Ruffner.

27 "This deed, made this eleventh day of May, in the year 1854, between John N. Clarkson and Ann L. Clarkson, his

wife, of the first part, and Daniel Ruffner, of the second part, all of the county of Kanawha and State of Virginia, witnesseth:

That the said parties of the first part, for and in consideration of the sum of two thousand three hundred and twenty-three dollars and seventy-five cents to them in hand paid, at and before the ensealing and delivery of these presents, the receipt of which is hereby acknowledged, have given, granted, bargained, and sold, and they do hereby give, grant, bargain, sell, and convey, unto the said party of the second part and to his heirs and assigns all their right, title, interest, claim, and demand, both at law and in equity, of, in, and to the following property, to wit:

All that lot, piece, or parcel of land and premises, containing, by estimate, 9 or 10 acres, be the same more or less, near to the corporate limits of the town of Charlestown, in said county, the same
28 at present owned and occupied by John N. Clarkson and in which he now resides, being bounded on three sides, the northern, eastern, and western, by three different streets, and on the other, the southern side, by the lots of William A. Whitteker and David C. Kline, and including all the land, buildings, and appurtenances conveyed by James M. Laidley and wife to the said John N. Clarkson by deed bearing date on the 6th day of September, 1851, and also all the lots of land conveyed to the said Clarkson by William Hedrick and wife, Elizabeth V. Cox, and Sarah Cox by deed bearing date on the 10th day of May, 1851, both of which deeds are duly recorded in the clerk's office of the county court of Kanawha county and to which reference may be had for a more accurate description of the property hereby conveyed, subject, however, to the deeds of trust upon said property—one, in favor of Mathew Dunbar, dated on the 29th day of July, 1852, and given to secure a debt of $2,021.60 due from said Clarkson to said
29 Dunbar; the other, to J. and W. F. Goshorn, dated the 14th day of August, 1852, and given to secure a debt due from said Clarkson to said J. and W. F. Goshorn amounting to $3,108.93, both of which deeds are liens upon said land and are duly recorded in the clerk's office of Kanawha county court; and the said parties of the first part expressly reserve and except from this sale and conveyance a space of ground twenty-five feet in width, beginning on the line of the cross-street at a point 25 feet from the southwestern corner of said land and opposite to the lot of John G. Wright, thence in an eastern course parallel with the back line of said David C. Kline's lot about 120 yards to the back line of the lot conveyed by the said Laidley to the said Clarkson aforesaid; thence continuing from that point a space of seven feet in width for about 60 yards, parallel with the lots owned and occupied by William A. Whittiker and Aaron Whittaker, to the point where there is now an offset of about seven feet in width in
30 said lot; to have and to hold the premises hereby conveyed and the interest therein to the said party of the second part and to his heirs and assigns forever; and the said parties of the first part covenant to and with the said parties of the second part that they will warrant generally the property hereby conveyed.

Witness the following signatures and seals:

JOHN N. CLARKSON. [SEAL.]
A. L. CLARKSON. [SEAL.]

STATE OF VIRGINIA,
County of Kanawha, } *To wit:*

I, John Dryden, a notary public for the county of Kanawha and State of Virginia, do certify that Ann L. Clarkson, the wife of John N. Clarkson, whose names are signed to the writing above, bearing date on the 11th day of May, 1854, personally appeared before me, in the county aforesaid, and, being examined by me privily and apart from her husband and having the writing aforesaid
31 fully explained to her, she, the said Ann L. Clarkson, acknowledged the said writing to be her act and deed and declared that she had willingly executed the same and does not wish to retract it.

Given under my hand this 11th day of May, 1854.

JOHN DRYDEN,
Notary Public.

KANAWHA COUNTY COURT,
CLERK'S OFFICE, *May 11th*, 1854.

This deed was this day presented to me and duly acknowledged by John N. Clarkson, party thereto, and thereupon, together with the certificate thereto annexed, admitted to record.

Teste: JOHN DRYDEN, *Dep.*,
For A. W. QUARRIER, *Clerk.*

A copy.
Teste: JNO. SLACK, *Recorder.*"

EXHIBIT.

Ruffner and Wife to Jeffries.

32 This deed, made this 24th day of March, in the year 1858 between Daniel Ruffner and Elizabeth Ruffner, his wife, of the first part, and George Jeffries, of the second part, all of the county of Kanawha and State of Virginia, witnesseth:

That the said party of the first part, for and in consideration of the sum of eight thousand dollars, secured to be paid to the said parties of the first part by the said parties of the second part at the date of these presents, have given, granted, and sold, and by these presents do hereby give, grant, bargain, sell, and convey, unto the said party of the second part and to his heirs and assigns all their right, title, and interest in and to that lot of land and premises containing, by estimate, nine or ten acres, be the same more or less, near to the corporation limits of the town of Charleston, in said county and State, at present owned and occupied by the said Daniel Ruffner, and in which he now resides, being bounded on three sides,

the northern, eastern, and western, by three dif-erent streets,
33 and on the other, the southern, by the lots of William A. Whittaker and Dan'l C. Kline, and including all the lands, buildings, and appurtenances conveyed by James M. Laidley and wife to John N. Clarkson by deed bearing date on the 6th day of Sept., 1851, and also all the lots of land conveyed to the said Clarkson by William Hedrick and wife, Elizabeth V. Cox, and Sarah Cox by deed bearing date on the 10th day of May, 1851, all of which deeds are duly recorded in the clerk's office of the county court of Kanawha county, and which lands are also conveyed by the said John N. Clarkson and wife to the said Daniel Ruffner by deed bearing date on the 11th day of May, 1854, and also recorded as aforesaid; but the said parties of the first part except and reserve from this sale and conveyance a space of ground twenty-five feet in width, lying on the line of the cross-street, at a point 25 feet from the southwestern corner of said land and opposite to the lot of John G.
34 Wright; thence in an eastern course parallel with the back line of said Daniel C. Kline's lot about 120 yards to the back line of the lot conveyed by the said Laidley to the said Clarkson as aforesaid; thence from that point a space seven feet in width for about 60 yards, parallel with the lots owned and occupied by Wm. A. Whittiker and Aaron Whittiker, to the point where there is an offset of about 7 feet in width in said lot; to have and to hold the premises conveyed and all the interest therein to the said party of the second part and to his heirs forever; and the said parties of the first part covenant to and with the said parties of the second part that they will warrant generally the property hereby conveyed.

Witness the following signatures and seals:

DANIEL RUFFNER. [SEAL.]
ELIZABETH RUFFNER. [SEAL.]

STATE OF VIRGINIA,
County of Kanawha, } *To wit:*

35 I, John Dryden, a notary public for the county and State aforesaid, do certify that Daniel Ruffner, whose name is signed to the writing above, bearing date on the 24th day of March, 1858, has acknowledged the same before me in my county aforesaid; and also that Elizabeth Ruffner, wife of the said Daniel Ruffner, whose name is signed to the writing above, dated as aforesaid, personally appeared before me in the county aforesaid, and, being examined by me privily and apart from her husband, and having the writing aforesaid fully explained to her, she, the said Elizabeth Ruffner, acknowledged the said writing to be her act, and declared that she had willingly executed the same and does not wish to retract it.

Given under my hand this 26th day of March, 1858.

JOHN DRYDEN,
Notary Public.

KANAWHA COUNTY COURT,
CLERK'S OFFICE, *April* 2*d*, 1858.

This deed, together with the certificate thereto annexed,
36 was this day presented to me and thereupon admitted to record.

Teste: JOHN DRYDEN, *Deputy*,
For A. W. QUARRIER, *Clerk*.

A copy.
Teste: JOHN SLACK, *Recorder*."

EXHIBIT.

Clarkson and Wife to Swann.

This deed, made this 21st day of July, 1858, between John N. Clarkson and Ann, his wife, of the one part, and T. B. Swann, of the second part, witnesseth:

That, in consideration of $2,372.99, the said Clarkson and wife do grant unto the said Swann the following property, house and lot, in the town of Charleston, to wit: A house and lot now occupied by John S. Moseley, containing about two acres of land, more or less, and lying opposite the carriage shop of —— Burlkes, and
37 adjoining the property — William Fisher, ——, Saunders, and others, the same being the house and lot sold and conveyed to John N. Clarkson by V. B. Donnally and Mary B., his wife, by deed bearing date 5th day of November, 1851.

The said Clarkson and wife doth warrant generally to said Swann the title to the property hereby conveyed, and the said Clarkson and wife acknowledge the receipt from the said Swann for the aforesaid sum of $2,372.99 in the following manner, to wit: $250 in cash and the residue ($2,122.99) by the payment, discharge, and satisfaction of two judgments in Kanawha circuit court, rendered at the fall term, 1857, of Kanawha circuit court in favor of T. B. Swann against John N. and D. J. W. Clarkson, one for $554.25 and the costs, and the other for $1,447.43 and the costs, which said two judgments, together with the interest and costs, at this day amount to the residue of the purchase-money aforesaid, to wit, $2,122.99, which, together with the cash payment aforesaid, makes up the sum of $2,372.99 aforesaid.

38 Witness our hands and seals.

JOHN N. CLARKSON. [SEAL.]
A. L. CLARKSON. [SEAL.]
T. B. SWANN. [SEAL.]

STATE OF VIRGINIA, *County of Kanawha*, } *To wit:*

I, John Dryden, a notary public in and for the county aforesaid, in the State of *West* Virginia, do certify that John N. Clarkson and Thomas B. Swann, whose names are signed to the writing hereto

annexed, bearing date on the 21st day of July, 1858, have acknowledged the same before me in my county aforesaid.

Given under my hand this 21st day of July, 1858.

JOHN DRYDEN, *N. P.*

STATE OF VIRGINIA,
County of Kanawha, } *To wit:*

I, John Dryden, a notary public in and for the county aforesaid, in the State of Virginia, do certify that Ann L. Clarkson, wife of John N. Clarkson, whose names are signed to the writing
39 hereto annexed, bearing date on the 21st day of July, 1858, personally appeared before me in the county aforesaid, and, being examined by me privily and apart from her husband and having the writing aforesaid fully explained to her, she, the said Ann L. Clarkson, acknowledged the said writing to be her act, and declared that she had willingly executed the same and does not wish to retract it.

Given under my hand this 29th day of September, 1858.

JOHN DRYDEN, *N. P.*

For and in consideration of $5.00, in hand paid, we, A. W. Quarrier and James Clarkson and Isaac Noyes and each of us for himself alone, release unto T. B. Swann, assignee of John N. Clarkson, any and all trusts or other liens we or either of us may have on the house and lot mentioned in the annexed deed; but this release is not intended to release our lien upon any of the other property of John N. Clarkson in any trust deed recorded in Kanawha county
40 court clerk's office.

Witness our hands and seals this 21st day of July, 1858.

A. W. QUARRIER. [SEAL.]
JAMES CLARKSON. [SEAL.]

STATE OF VIRGINIA,
County of Kanawha, } *To wit:*

I, John Dryden, a notary public in and for the county aforesaid in the State of Virginia, do certify that on the 21st day of July, 1858, Alexander W. Quarrier, and that on the 24th day of September, 1858, James Clarkson, whose names are signed to the writing hereto annexed, bearing date on the 21st day of July, 1858, acknowledged the same before me in my county aforesaid.

Given under my hand this 24th day of September, 1858.

JOHN DRYDEN, *N. P.*

KANAWHA COUNTY CLERK'S OFFICE,
September 29, 1858.

This deed, together with the certificate thereto annexed, and

41 the deed of release, with the certificate thereto annexed, were this day presented to me and all admitted to record.

Teste: JOHN DRYDEN, *Deputy*,
For A. W. QUARRIER, *Clerk*.

A copy.
Teste: JOHN SLACK, *Recorder*.

EXHIBIT.

Deed. Swann to Mayes.

Whereas John N. Clarkson and wife, by deed of record in Kanawha county court clerk's office, conveyed to T. B. Swann a lot or parcel of land and tenements lying on back street and immediately opposite the property of S. Burke, the same being the property on which C. Rand and his family lately lived; and whereas T. B. Swann has since sold and conveyed a nook and corner of said lot to Charles Bryant by title deed of record, showing the lot now enclosed with a figure resembling a square, and all under fence; and

42 whereas said Swann, after reserving and retaining to himself (92½) ninety-two and a half feet of said lot fronting on back street and adjoining the lot of Nelson Mahon and extending along the street towards the house upon the property, and also extending back to the lots of John A. Truslow, so as to lay also 92½ feet on John A. Truslow's lot, he sold to E. W. Mays the rest and residue of said lot and tenements, embracing all the houses on the property, and extending the street beyond the houses about 18 feet so as to leave to said Swann 92½ feet on the street aforesaid, and extending also back to the Truslow line on the back of this lot:

Now, therefore, this deed, made this 4th day of January, A. D. 1860, between Thomas B. Swann, of the first part, and Ezekiel W. Mayes, of the second part, witnesseth:

That in consideration of $2,200 in hand paid, the receipt whereof in full is hereby acknowledged, the said T. B. Swann doth

43 grant unto the said E. W. Mays the lot, house, and tenements aforesaid, expressly and forever reserving and retaining to himself and his heirs (92½) ninety-two and one-half feet of said lot, to adjoin the lot of N. Mahon, where the two lots corner on back street near the county jail, and extend along the street 92½ feet towards the house for quantity, said 92½ feet to extend back the entire length of the lot to the lot of John A. Truslow on the back line.

And the said Swann doth warrant unto said Mayes the title to said lot forever, excepting and reserving the 92½ feet aforesaid unto said Swann forever.

Witness the following signature and seal:

THOMAS B. SWANN. [SEAL.]

KANAWHA COUNTY COURT,
CLERK'S OFFICE, *January 4th*, 1860.

This deed was this day presented to me and duly acknowledged by Thomas B. Swann, party thereto, and thereupon admitted
44 to record.

Teste: JOHN DRYDEN, *Dep.*,
For A. W. QUARRIER, *Clerk*.

A copy.
Teste: JNO. SLACK, *Recorder*.

EXHIBIT.

Swann to Mayes.

This deed, made this the 31st day of January, 1860, between Thomas B. Swann, of the first part, and E. W. Mayes, of the second part, witnesseth:

That, in consideration of $900 in hand paid, the receipt whereof is hereby acknowledged, the said Swann doth grant unto the said Mayes ninety-two and one-half (92½) feet of land on back street, opposite Burke's shop and adjoining the property lately granted by said Swann to said Mayes (and the same being the residue of said lot), the said 92½ feet to extend back to the Truslow lot:

45 To have and to hold unto the said Mays this said (92½) ninety-two and a half feet, with covenants of general warranty, forever.

Witness the following signature and seal:

T. B. SWANN. [SEAL.]

KANAWHA COUNTY COURT,
CLERK'S OFFICE, *January 30*, 1860.

This deed was this day presented to me and duly acknowledged by Thomas B. Swann, party thereto, and thereupon admitted to record.

Teste: A. W. QUARRIER, *Clerk*.

A copy.
Teste: JNO. SLACK, *Recorder*.

46 EXHIBIT.

Mayes and Wife to Young.

This deed, made this 10th day of June, 1864, between Ezekiel Mayes and Malinda, his wife, of the first part, and John D. Young, of the second part, witnesseth:

That the said parties of the first part, in consideration of the sum of three thousand dollars, do grant unto the said John D. Young, with covenants of general warranty, the two following-described lots in the town of Charleston, West Virginia, one of which fronts on back street ninety-two and a half feet, opposite Burke's carriage-

shop, and the same lot conveyed to said E. Mayes by Thomas B. Swann, by deed dated the 31st day of January, 1860, and duly recorded in the clerk's office of Kanawha county in Book W, page 232, to which reference is made; the other lot, also on back street aforesaid and adjoins the lot herein first described, and also con-
47 veyed to said Mayes by said Thomas B. Swann, by deed dated the 4th day of January, 1860, and recorded as aforesaid in Book W, page 231, to which reference is also made, on which lots there is a large brick house and brick office, built and for many years occupied by Col. Joseph Lovell, on the northeast side of said back street; to have and to hold the same to the said John D. Young forever; and the said Mayes retains a vendor's lien for three hundred and sixty-nine dollars and eighty-six cents, the residue of purchase-money on said lots, to secure the payment thereof, which sum is evidenced by the single bill of said John D. Young for that sum, bearing date on the 28th day of May, 1864, and payable on demand.

The consideration paid by said Young is thirty-one hundred dollars, and the words "with covenants of general warranty" interlined before signing this deed.

48 Witness our signatures and seals the day and year first aforesaid.

E. W. MAYES. [SEAL.]
MALINDA MAYES. [SEAL.]

KANAWHA COUNTY RECORDER'S OFFICE,
June the 14th, 1864.

I, John Slack, recorder in and for the said county of Kanawha, do hereby certify that Ezekiel M. Mayes and Malinda Mayes, his wife, whose names are signed to the foregoing deed, bearing date the 10th day of June, 1864, this day appeared before me in my office and acknowledged the same as their act and deed for the purposes therein set out, and the said Malinda, wife of the said Ezekiel, being examined by me privily and apart from her husband and having the deed aforesaid fully explained to her, declared that she had willingly signed and executed the same and that she did not wish to retract it, and thereupon the same, being duly stamped, was admitted to record.

Teste: JNO. SLACK, *Recorder.*

A copy.
Teste: JNO. SLACK, *Recorder.*

49 And at another day, to wit, at a circuit court held, as aforesaid, on the 8th day of June, in the year 1866, came Robert W. Clarkson, a party defendant to this suit, and by leave of the court entered his appearance and by counsel tendered his answer, which was filed and is in the words and figures following, to wit:

"*Answer of R. W. Clarkson, Administrator.*

To the Hon. D. Polsley, judge of Kanawha circuit court:

The separate answer of Robert W. Clarkson, administrator of James Clarkson, deceased, to a bill of complaint filed against himself and others by Milton Parker.

This respondent, after the usual reservations, answers and says:

That it is true, as alleged in the bill, that the defendant, John N. Clarkson, executed, on the 14th August, 1852, a deed of trust to John J. Williams to secure a large number of creditors, among others your respondent's intestate, James Clarkson, in the sum of
50 $7,000, with legal interest thereon from 6th January, 1848. It is also true that said debt nor any part thereof has ever been paid, and that the whole sum, with the interest, is still due. The property conveyed in the trust deed is correctly described in the bill, with one exception. Sybil Allen has an interest in the salt property described in the trust deed beyond her dower. In a proceeding had in a chancery suit pending in this court, in which none of the trust creditors were parties, the court decreed a specific performance of a contract between Sybil Allen and John N. Clarkson made subsequent to the date of said trust. Under this decree a portion of the salt property has been sold and bought in by said Sibil. All of these proceedings are void as far as the trust creditors of the said Clarkson are concerned, and the whole salt property is liable to their debts, except the dower of the said Sybil. This re-
51 spondent concurs in the prayer of the bill that the trust property be sold; that a trustee be appointed and the proceeds be distributed among the creditors, among whom your respondent is the largest; and, having fully answered, respondent prays to be hence dismissed.

R. W. CLARKSON,
Adm'r of Jas. Clarkson, Deceased.

SUMMERS, *Sol.*

KANAWHA COUNTY, *To wit:*

R. W. Clarkson makes oath that he is informed and believes that the foregoing answer is true.

Given under my hand this 7th day of November, 1865.

JNO. A. TRUSLOW,
J. P. for the County of Kanawha."

Decree Recommitting Cause to Com'r Laidley.

And at another day, to wit, at a circuit court held for the county aforesaid, at the court-house thereof, the 21st day of June, 1870.

On motion of the defendants, by counsel, it is ordered that
52 the general report made and returned in this cause, shewing a table of the judgments and other liens upon the real estate of the def't Clarkson, be recommitted to Alexander T. Laidley, who

is hereby appointed a special commissioner for ascertaining and reporting the unsatisfied judgments and liens aforesaid.

And said special commissioner is hereby directed to report no debt or judgment as due and unpaid unless assorted and established according to the rules adopted by this court as to causes before master commissioners in chancery, and said special commissioner shall give thirty days' notice of the time and place of proceeding to execute this order by advertisement in one of the newspapers published in Charleston, as prescribed by rules.

And, it appearing to the court that there is a fund of more than four thousand dollars standing to the credit of this suit and in the hands of the receiver of this court which ought to be distributed and paid over to those entitled to the same—

53 It is therefore further ordered that said special commissioner make out and return, at as early a day as practicable during the present term, a special report shewing to what debts said fund is legally applicable, exhibiting a table of the unsatisfied judgments according to their priorities, and if such priorities have been disturbed by the deed of trust executed by the def't Clarkson on the 16th day of November, 1857, to indemnify S. A. Miller & J. K. Johnson, that he include in such table a list of the judgments rendered against said defendant prior to the last-mentioned date, and which were docketed within the time prescribed by law, so as to preserve the lien thereof as against a purchaser for value without notice.

And at another day, to wit, at a circuit court held as aforesaid the 16th day of November, 1871.

Motion to Remove Cause to U. S. Court.

MILTON PARKER, Comp't,

vs.

JOHN N. CLARKSON & Others, Def'ts.

In chancery and on petition of C. G. Hussey & Co.

54 Came the petitioners, C. G. Hussey & Co., by their counsel, and tendered their petition and affidavit in this cause, and moved the court to remove the same to the district court of the United States for the district of West Virginia, holden at Charleston, there to be heard, tried, and determined.

Whereupon time was taken to consider of said motion.

And at another day, to wit, at a circuit court held, as aforesaid, the 7th day of July, 1871, came Hussey & Co. and John Johns, assignee, and tendered their petition in this cause.

And at another day, to wit, at a circuit court held, as aforesaid, the 8th day of July, 1871, the defendants, C. G. Hussey & Co. and John Johns, assignee of John N. Clarkson in bankruptcy, filed their petition in this cause and an affidavit under the act of Congress,

stating that the petitioners, C. G. Hussey & Co., are citizens
55 of the State of Pennsylvania, and the petitioner, John Johns, assignee, &c., *that he* is a citizen of the State of Virginia; that certain persons, Henry Chappell and others, parties to this cause, are citizens of the State of West Virginia, and that in this suit there is a controversy between the petitioners, C. G. Hussey & Co. and John Johns, assignee, &c. (in different rights), and Henry Chappel and others, the defendants in this suit, who are set out in said petition as and really are citizens of the State of West Virginia, where this suit is pending, and in this suit that the matter in dispute exceeds $500, exclusive of costs, & that they, the petitioners, C. G. Hussey & Co. and John Johns, assignee, &c., have reason to and do believe that from prejudice or local influence they and each of them will not be able to obtain justice in this court; and thereupon the said Hussey & Co. and John Johns, assignee, tendered a bond with T. B. Swann, responsible person, and B. H. Smith, his surety, conditioned according to act of Congress, and in the
56 penalty of $500.00; and the court deeming said bond and surety sufficent, on motion of C. G. Hussey & Co. and John Johns, assignee, it is transferred to the U. S. district court held at Charleston and having circuit court powers, there to be finally heard, tried, and determined.

The affidavit and petition referred to in the foregoing decree are in the words and figures following, to wit:

Petition & Affidavit.

"To the Hon. J. W. Hoge, judge of Kanawha circuit court:

Your petitioners, John Johns, assignee of J. N. Clarkson in bankruptcy, and a citizen and inhabitant of the State of Virginia, and C. G. Hussey & Charles Avery, partners in business, using the name of C. G. Hussey & Co., and citizens and inhabitants of the State of Pennsylvania, respectfully represent unto your honor that they are parties defendants, and also pl't'ffs on bill of review and petition in a suit pending in chancery in your honor's court, in Kanawha county, in which Milton Parker is compl't and John N.
57 Clarkson and others are defendants.

That among the defendants are E. Hemmings, S. Thornburg, A. H. Beach, Henry Chappell, J. H Brown, Ann Thomas, J. M. Laidley, & J. D. Lewis, & J. C. Ruby, all of whom are citizens and inhabitants of the State of West Virginia; that said suit is now pending in said circuit court of Kanawha county, and in said suit there is a controversy between your petitioners in different rights, and the aforesaid parties, citizens and inhabitants of the State of West Virginia, in which said suit is pending; that the matter in dispute exceeds the some of $500, exclusive of costs. Your petitioners have reason to and do believe that from prejudice or local influence they nor either of them will not be able to obtain justice in such State court; they file this petition for the removal of said cause of Parker *vs.* Clarkson and others, now pending in the circuit court for Kanawha county, West Virginia, unto the district court

of the U. S., held at Charleston, W. Va., the same being in
58 the district where this suit is pending, &c.

C. G. HUSSEY & CO.,
By Counsel.
JOHN JOHNS, *Assignee*,
By Counsel.

T. B. SWANN,
J. E. KENNA, *Sol's.*

WEST VIRGINIA, *Kanawha County, Charleston Township:*

This day J. N. Clarkson, a party to the above-mentioned suit, came in person before me, at my said Co. and township, and made oath that the matters and things set out and the facts stated in the foregoing petition are true.

Given under my hand this 5th July, 1871; and I do certify that I am a justice for Charleston township, Ka. Co.

JNO. A. TRUSLOW,
Justice of Charleston Township."

And now, at this day, to wit, at a circuit held for Kanawha county, at the court-house thereof, on the 10th day of April, 1872, came the parties, by their attorneys, and it appearing to the
59 court that on the petition of the said Milton Parker and others an order was made by this court on the 8th day of July, 1871, reciting by mistake that a bond had been filed in pursuance of an act of Congress to remove this cause to the district court of the United States for the district of West Virginia, having circuit court powers;

And it appearing to the court that no bond has been filed in this court, as stated in said order; and now, on this day, the said petitioners filed a bond in the penalty of $1,000, conditioned according to the act of Congress in such case made and provided, and on their petition, filed as is stated in said order of the 8th July, 1871, and on the affidavit of the said C. G. Hussey, this day filed, the sufficiency of which affidavit and bond is hereby approved by this court—

Upon consideration whereof it is hereby ordered that this cause be removed to the said United States district court, according
60 to prayer of the said petitioners and said act of Congress, and that the clerk of this court do forthwith make out and certify to said district court of the United States copies of all process, pleadings, depositions, testimony, and other proceedings in said suit.

The affidavit of said C. G. Hussey referred to in the foregoing order is in the words and figures following, to wit:

Affidavit of C. G. Hussey.

"To the Honorable J. W. Hoge, judge of Kanawha circuit court, West Va.:

Your petitioners, C. G. Hussey and Charles Averey, partners in

trade, using the name, firm, and style of C. G. Hussey & Co., and citizens and inhabitants of the State of Pennsylvania, respectfully represent unto your honor that they are parties defendants, and also parties plaintiffs on petition and bill of review in a cause pending, on the chancery side of your honor's court, in Kanawha county, West Virginia, in which Milton Parker is complainant and John N. Clarkson & *als.* are defendants.

That among the defendants are E. Hemmings, A. H.
61 Beach, H. Chappell, J. H. Brown, J. D. Lewis, J. M. Laidley, all of whom are citizens and inhabitants of the State of West Virginia; that said suit and bill of review therein are now pending in said court for Kanawha county, W. Va.

That in said suit and bill of review there is a controversy between your petitioners in different rights and the aforesaid parties, citizens and inhabitants of the State of West Virginia, in which State said suit is pending; that the matter so in controversy and dispute exceeds the sum of $500, exclusive of costs.

Your petitioners have reason to and do believe that from prejudice or local influences they will not be able to obtain justice in said State court.

They file this petition for the removal of said cause of Parker *vs.* Clarkson & *als.*, now pending in the circuit court for Kanawha county, West Va., unto the district court of the U. S. for the district of W. Va. (having cir. c't powers), held at Charleston, W. Va., same being in the district where this suit is now pending.

62 15th Sept., 1871.

C. G. HUSSEY & CO.,
By Counsel.

T. B. S., *Sol.*

STATE OF PENNSYLVANIA, }
City of Pittsburgh, Allegheny County, } *sct:*

I, William F. Robb, do certify that I am a notary public, duly commissioned and sworn, residing in said city and State.

And I do further certify that Curtis G. Hussey, one of the members of the above-described firm of C. G. Hussey & Co., came in person before me, at the city, county, and State aforesaid, and made oath that the facts set out in the foregoing petition, so far as stated on his own knowledge, are true, and, so far as stated upon information derived from others, he believes them to be true.

C. G. HUSSEY.

Sworn to and subscribed before me this 22nd day of September, 1871.

Witness my hand and seal of office.

[SEAL.] WILLIAM F. ROBB,
Notary Public."

63 And at another day, to wit, the 11th day of April, 1870, came the defendants, John Johns, assignee, &c., and C. G.

Hussey & Co., by their counsel, and filed their bond for the removal of this cause to the district court of the United States at Charleston; which bond is in the words and figures following, to wit:

Bond Removing Cause to U. S. Court.

JOHN JOHNS, Assignee, &c.,
and
C. G. HUSSEY & Co.

"Know all men by these presents that we, John Johns, assignee in bankruptcy of John N. Clarkson, and C. G. Hussey and Charles Avery, partners in business, using the name of C. G. Hussey & Co., are held and firmly bound unto Milton Parker in the just sum of one thousand dollars, lawful money of the United States of America; to the payment of which we bind ourselves, our heirs, &c., jointly and severally, firmly by these presents.

Sealed with our seals and dated this 10th day of April, 1872.

The condition of the above obligation is such that whereas the said John Johns, assignee in bankruptcy as aforesaid, and
64 the said C. G. Hussey & Co. have applied to the circuit court of Kanawha county, in the State of West Virginia, for the removal to the district (or circuit) court of the United States for the district of West Virginia of a certain suit in chancery in said circuit court of Kanawha county pending, in which the said Milton Parker is plaintiff and the said John N. Clarkson and others are defendants, which application has been granted under the provisions of the act of Congress for the removal of causes in certain cases from State courts, approved March 2, 1867:

Now, therefore, if the said John Johns, assignee as aforesaid, C. G. Hussey and Charles Avery, partners as aforesaid, shall on the first day of the next term of the said United States district (or circuit) court, to be holden at Charleston, West Virginia, enter in said court copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and do such other appropriate acts as by the act to which said act of March 2, 1867, is amendatory and required
65 to be done upon the removal of a suit into the United States court, then this obligation to be void, but otherwise to remain in full force and virtue.

JOHN JOHNS, *Assignee, &c.*, [SEAL.]
By JAMES H. FERGUSON, *His Att'y.*
C. G. HUSSEY, [SEAL.]
By JAMES H. FERGUSON, *His Att'y.*
CHARLES AVERY, [SEAL.]
By JAMES H. FERGUSON, *His Att'y.*
JAMES M. LAIDLEY. [SEAL.]"

66 And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, on Tuesday, the 21st day of January, A. D. 1873, it appearing from the certificate of John Slack, clerk of the circuit court of Kanawha

county, in the State of West Virginia, as well as upon the examination in open court of John Dryden, deputy clerk of the court aforesaid, that copies of all process, pleadings, depositions, testimony, and other proceedings of said circuit court for said county in the cause of Milton Parker against John N. Clarkson & others, lately depending in said court, have been filed and entered in this court, it is ordered that said cause be here docketed, to be further proceeded in hereafter as if it had been originally brought herein.

And on the same day, to wit, at a district court of the
67 United States for the district of West Virginia, held as aforesaid, on the day and year last aforesaid, on motion of the defendants, by counsel, it is ordered that the report of Special Commissioner A. T. Laidley, heretofore filed in this cause, be recommitted to him with directions to report—

First. All claims against J. N. Clarkson heretofore reported by him, either by judgment or otherwise, as well as all claims not heretofore embraced in his report, whether judgment or otherwise, and their respective priorities.

Second. Also the dates of the last issuing of the executions upon the several judgments, and whether any judgments or claims are barred by the statute of limitations; and, if so, what claims are so barred and by whom plead-.

Third. And the commissioner is also to report the amount of the costs of making said reports, and report any further matter as he may deem pertinent or any other party in interest may re-
68 quire. Publication of the time and place of taking the foregoing account shall be made in some newspaper printed in the city of Charleston weekly for four weeks, and the same shall be deemed equivalent to personal service on said defendants.

We agree to the entering of the foregoing amendment to the order entered in this cause.

N. FITZHUGH,
JAMES M. LAIDLEY,
For Def'ts.
SWANN & KENNA,
For Pl'ffs in Bill of Review and Other Creditors.

And at another day, to wit, at a district court of the United States for the district of West Virginia held, as aforesaid, on Wednesday, the 24th day of December, A. D. 1873.

This day this cause came on to be heard upon the motions of John Johns, Jr., assignee in bankruptcy of John N. Clarkson, bankrupt, to file his petition for a rehearing in this cause, tendered
69 in the circuit court of Kanawha county, and of C. G. Hussey to file the petition tendered by him in said court on the 12th day of April, 1873, and of said Hussey to file the bill of review heretofore tendered by him in this cause in said court, and of S. H. Early, as trustee of his wife, Henrian Early, heretofore tendered in this cause in this court. * * * And it is further adjudged, ordered, and decreed that said Commissioner Fontaine shall do and

perform all the duties required by Commissioner A. T. Laidley by a former decree in this cause, but he is to adopt the report made out by said Laidley so far as the same shall not appear to him to be erroneous.

* * * * * * *

And at another day, to wit, at a district court of the United States for the district of West Virginia held, as aforesaid, on Thurs-
70 day, the 7th day of May, A. D. 1874.

It being suggested that since the institution of this suit the plaintiff, Milton Parker, and one of the defendants, Samuel H. Early, have departed this life; whereupon the suggestion of the death of said parties is here entered of record.

And at another day, to wit, at a district court of the United States for the district of West Virginia held, as aforesaid, on Tuesday, the 9th day of February, A. D. 1875, the death of the complainant, Milton Parker, having been suggested at the last term of this court, on motion of E. B. Knight, who has since been appointed administrator of the estate of the said Milton Parker, dec'd, by the circuit court of Kanawha county, West Virginia, it is ordered that this suit be revived and prosecuted in the name of said E. B. Knight, as such administrator.

* * * * * * *

71 And at another day, to wit, at a district court of the United States for the district of West Virginia held, as aforesaid, on Thursday, the 21st day of October, A. D. 1875.

Ordered, That in making up his report in this cause Commissioner Peter Fontaine shall not report any judgment or other claim against defendant Clarkson, except in conformity to the rules of this court in such case provided, requiring such claim or judgment to be laid before him to be reported upon, or has heretofore been claimed, before Com'r Laidley, by petition or otherwise, in writing, to be reported upon.

And at another day, to wit, in the clerk's office of the district court of the United States for the district of West Virginia, at Charleston, in vacation, on the 2nd day of October, 1877.

This day Commissioner Peter Fontaine returned and filed
72 his report in this cause, made in pursuance of decrees heretofore entered herein.

The report referred to in the foregoing order is in the words and figures following, to wit:

"In the District Court of the United States for the District of West Virginia, Sitting at Charleston, in Kanawha County, in said District. In Chancery.

MILTON PARKER'S ADMINISTRATOR
vs.
JOHN N. CLARKSON and Others.

OFFICE OF PETER FONTAINE, COMMISSIONER OF U. S. COURT FOR DISTRICT OF WEST VIRGINIA, CHARLESTON, WEST VIRGINIA, *Oct. 30th*, 1876.

To the Honorable John J. Jackson, Jun., judge of said court:

Your undersigned commissioner respectfully reports that
73 the following decrees and orders of reference in the above-entitled cause have been made and entered by the circuit court of Kanawha county, West Virginia, and by your honorable court, viz:

By a decree of the circuit court of Kanawha county, West Virginia of the 10th day of April, 1866, it was ordered, among other things, that this cause be referred to a master to take, state, and report the following accounts and facts:

First. What personal property, if any, the defendant, John N. Clarkson, owns within the jurisdiction of this court.

Second. What real estate the said defendant owned within this State at the time the complainant's earliest judgments named in his bill were obtained, and the disposition that has since been made of the same.

Third. The liens upon said real estate, whether by trust deed, judgment, or otherwise, and the priorities of said liens.

Fourth. Whether the rents, profits, and issues of said real
74 estate will pay and discharge said liens within five years.

Fifth. Such other and further matter as any of the parties may require or the commissioner deem pertinent. See decree of Kanawha circuit court of date above specified.

Under this decree a notice of the taking of the account therein ordered was given by Henry C. McWhorter, who was, at the time of giving said notice, a master commissioner in chancery for Kanawha county, West Virginia. No report under the said decree was made or filed in the cause by the said commissioner, Henry C. McWhorter, or by any other master commissioner, but a paper which purported to be a report made in pursuance of the said decree and which was signed by Alexander T. Laidley was filed in said cause on the 18th day of February, 1870. At the date at which the said paper was filed in this cause the said Alexander T. Laidley was not a commissioner in chancery and he had not been appointed
75 a special commissioner in this cause. The said A. T. Laidley was subsequently, on the 21st day of June, 1870, appointed a special commissioner in this cause.

See decree of Kanawha circuit court dated June 21st, 1870.

This paper, so filed in this cause by Alexander T. Laidley, is the

same one that is referred to in subsequent decrees in this cause as "the report of A. T. Laidley."

See copy of paper filed in Kanawha circuit court clerk's office on February 18th, 1870.

These facts with regard to the paper that is styled the "report of A. T. Laidley" are noted here because of their bearing on the question of the bar of the statute of limitations to certain claims against the defendant, John N. Clarkson, which are set out and described in the said paper.

Your undersigned commissioner is of the opinion, and so reports, that all of the proceedings had by the said A. T. Laidley in
76 this cause preparatory to the making up of the said paper and the said paper itself are null and void and of no effect.

District C. U. S.

By a decree of the circuit court of Kanawha county, West Virginia, of January 21st, 1873, it was provided as follows:

It is ordered that the report of Special Commissioner A. T. Laidley, heretofore filed in this cause, be recommitted to him with directions to report—

First. All claims against J. N. Clarkson heretofore reported by him, either by judgment or otherwise, as well as all claims not heretofore embraced in his report, whether judgment or otherwise, and their respective priorities.

Second. Also the dates of the last issuing of the executions upon the several judgments, and whether any judgments or claims are barred by the statute of limitations; and, if so, what claims are so barred and by whom pleaded.

77 Third. And the commissioner is also to report the amount of the costs of making said report, and report any further matter as he may deem pertinent or any other party in interest may require. * * *.

By a decree of your honorable court dated December 24th, 1873, it was provided among, other thing, as follows:

It is adjudged, ordered, and decreed that Commissioner Peter Fontaine do take, state, and report an account showing "who has occupied the said farm since the said sale thereof, and who has received the rents, issues, and profits thereof since that time, and also the reasonable value of said rents, issues, and profits, and what improvements, if any, have been made on said farm during that time, and their value and by whom made.

And it is further adjudged, ordered, and decreed that said Commissioner Fontaine shall do and perform all the duties re-
78 quired of Commissioner A. T. Laidley by a former decree in this cause, but he is to adopt the report made out by said Laidley so far as the same shall not appear to him to be erroneous; but before taking said account he shall publish a notice of the time and place of the taking thereof once in each week for four successive weeks in some newspaper published in the county of Kanawha,

which publication shall be equivalent to personal service on all the parties interested in the said account.

* * * * * * *

And at another day, to wit, at a district court of the United States for the district of West Virginia, held at Charleston, on Wednesday, the 7th day of November, A. D. 1877.

This cause came on to-day to be heard upon the papers heretofore read and proceedings had therein and upon the report of Com'r Peter Fontain, filed in the clerk's office October 2nd,
79 1877, and was argued by counsel Upon consideration whereof and for reasons appearing to the court it is adjudged, ordered, and decreed that said report be recommitted to the said commissioner, Peter Fontain, to take, state, and report the accounts heretofore directed in this cause, after having given ten (10) days' previous notice thereof by publication made in some newspaper published in Kanawha county, which publication shall be equivalent to personal service of said notice on all parties interested in said report and account, with leave to any party to introduce any new testimony before said commissioner relative to the matters upon which he is required to report.

And the said commissioner is ordered to summon the def't, John N. Clarkson, to appear before him to give testimony relative to said matters, and if said Clarkson does not appear when summoned, leave is granted to any party desiring his evidence
80 to apply to the judge of this court for a rule and attachment, in vacation, to compel said attendance before said commissioner. * * *

And at another day, to wit:

Clerk's office of the district court of the United States for the district of West Virginia, at Charleston, the 14th day of October, 1878.

This day Commissioner Peter Fontaine returned his report in this cause, which is here filed.

And at another day, to wit, at a district court of the United States for the district of West Virginia held at Charleston on Saturday, the 30th day of November, A. D. 1878.

It is ordered that this cause be recommitted to Commissioner P. Fontaine to retake, state, and report the accounts heretofore
81 referred to him, and the commissioner is required, in making up his report, to report, separate to itself, each claim and the evidence for and against its allowance.

And the commissioner is required not to report any claim to which the claimant or some person for him does not file his claim in writing, together with some affidavit or deposition showing that the same is not paid in whole or in part and showing the claimant's interest therein.

And on motion of the plaintiff he has leave to file a supplemental bill in this cause making Cabell Early and Henrian Early parties defendant therein, which is forthwith done, and process is awarded thereon against said Earlys to answer, returnable at the December

rules, and said supplemental bill is sent to the rule docket to be there matured for hearing; and it appearing that the said Cabell Early and H. A. Early are non-residents of this district and residents and citizens of the State of Virginia, it is therefore
82 further adjudged, ordered, and decreed that in case personal service of said process cannot be had on them within this district that they may be proceeded against by publication in the manner prescribed by act of Congress against non-residents.

And it is further adjudged, ordered, and decreed that after this cause is matured for hearing against the said Cabell Early and H. A. Early the said commissioners shall take all such evidence as may be offered by either party in relation to the occupancy of the farm below Charleston, mentioned in the bill and proceedings in this cause, by whom so occupied, and report thereon to this court whether it was so occupied by the consent and permission of the wife of Samuel H. Early or of her trustee, and whether Mrs. Early or her trustee derived any benefit from said occupation, together with any other matter or thing in relation thereto or in relation to any claim mentioned in his report which he may deem per-
83 tinent or proper or which any party may request.

But before proceeding under this decree he must give notice of the time and place at which he will do so by advertisement, published in some newspaper printed in Charleston, at least once in each week for four successive weeks, which publication when so made shall be equivalent to personal service of said notice on all the parties interested in this suit.

And it is further adjudged, ordered, and decreed that Commissioners Knight, Mollohan, and Ferguson do proceed to rent the said farm for another year from and after the first day of March, 1879, upon the terms of the former decree herein.

And at another day, to wit, in the district court of the United States for the district of West Virginia, at Charleston, March 31st, 1880, in vacation.

84 This day Peter Fontaine, commissioner in this cause, returned his report, which is filed.

And at another day, to wit, in the district court of the United States for the district of West Virginia, at Charleston, Jan'y 20, 1881, in vacation.

The complainant in this cause and the defendant, by counsel, having asked the undersigned judge of the district court of the United States for the district of West Virginia to order a recommitment of the report of Com'r Fontaine, filed on the 31st day of March, 1880, in order that this cause may be heard at the next term to be holden at Charleston upon the matters arising in said report, and counsel representing a large amount and number of debts claimed in this cause uniting in asking such recommittal, it is therefore adjudged, ordered, and decreed that said report of Com'r Fontaine be recommitted to him with instructions to take testimony and report—

85 1st. Any new or additional evidence which may be adduced before him as to any debt allowed or rejected as binding upon the real estate of the defendant, as ascertained by him in his said report, filed March —, 1880, and upon such evidence make his report to the next term of court.

2nd. In order to avoid unnecessary labor the commissioner shall adopt his table and calculation of interest as to judgments not excepted to and as to judgments not reported by him as liens in said report, filed the 31st day of March, 1880, and as to judgments shown to have been paid in part, whether heretofore reported or not in said report, remodel his table of liens and priorities so as to comply with the directions of this order, omitting such as may be shown to have been paid in full or as not binding upon the defendant's lands, conforming the same to the new or additional proofs which may be offered before him, calculating the interest to 18th October, 1878.

86 3rd. Any other matter deemed pertinent by the com'r or required by any party to these proceedings. Publication of the substance of this order for four weeks in some newspaper published in Kanawha county, W. Va., giving notice of the time and place of taking this account and taking evidence shall be deemed equivalent to personal service upon all parties hereto; but this order is not to operate to delay the final hearing of the case at the next term unless the court should be of opinion to sustain exceptions now taken, and the court will reserve the questions of costs arising on this motion for future disposition.

And at another day, to wit, in the district court of the United States for the district of West Virginia, at Charleston, on Wednesday, the 4th day of May, 1881.

This day Commissioner Peter Fontaine returned his report in this cause, which is filed.

87 The following is an extract from the deposition of John N. Clarkson, filed with the report of Commissioner Fontaine aforesaid:

* * * * * * *

22d by same. Are you the same John N. Clarkson that executed the deeds of trust filed as parts of the records in this cause—one dated October 3rd, 1857, one dated November 16th, 1857, and the 3rd dated August 14th, 1852?

Answer. I am. All the debts secured in the deed of trust of August are paid except the one due to my father. The Newman debt I paid about 1860. The deed of trust to Samuel A. Miller and John R. Johnson was given to secure them as my securities on the purchase of a coal and salt property that I had bought, situated on Kanawha river, up on the other side, which was sold during the war to pay the balance of the purchase-money, and that settled that.

* * * * * * *

88 And at another day, to wit, at a district court of the United

States for the district of West Virginia, held at Charleston, on Friday, the 27th day of May, 1881.

This day this cause came on again to be heard and was argued by counsel; and thereupon it is adjudged, ordered, and decreed that the 3d & 4th reports of Commissioner Fontaine, filed in this cause, be recommitted to said commissioner, and that he report, in addition thereto, an account of the following matter- and things:

1st. The date of the first and of every succeeding execution, if any, issued on each of the judgments mentioned in his said reports; the return day of each of said executions; whether or not the same or any of them were returned and the return made thereon; but the court is not concluded as to the law arising upon this enquiry.

2d. If any such judgment is claimed by any person other than the judgment creditor, the name of such claimant and how
89 he claims, whether by assignment or otherwise.

3d. What claimants of said judgments appeared before said commissioner or Commissioner A. T. Laidley, in person or by attorney, and proved their claims, and how; if by attorney, the name of such attorney; who, if any of them, filed petitions or affidavits, or both, to support their claims, either before him or the said Laidley, with the date of such filing; and if any such claimant appeared before him or said Laidley, in person or by attorney, to present or prove their claims under any of said judgments without filing petitions or affidavits, who did so and when, the name of the atto., if one appeared, and what proof, if any, was offered to prove said claims by them.

4th. Which of the said judgments, if any, are barred by the statute of limitations, which limitation is to be computed as follows: First, on a judgment on which no execution issued within one year
90 after the date thereof the limitation is 10 years from and after the date of the judgment, except as hereinafter provided.

* * * * * * *

And the right is reserved to any of the defendants named in the bill on whom process was served to claim such benefit as they are entitled to as to the statute of limitations by reason of their being such defendants.

And it is further adjudged, ordered, and decreed that said commissioner take any evidence in the form of depositions which any party may offer upon any of the questions of fact growing out of this reference to him, and return the same with his report herein to the next term of this court.

* * * * * * *

But before proceeding under this decree the said com'r shall give notice of the time and place at which he will commence the taking of the account herein directed in the "Kanawha Gazette," a newspaper published in the city of Charleston, once in each week
91 for four successive weeks, which notice, when so published, shall be equivalent to personal service thereof on all the parties to this suit.

* * * * * * *

And at another day, to wit, at a district court of the United States

for the district of West Virginia held, as aforesaid, on Wednesday, the 23d day of November, A. D. 1881.

This day T. B. Swann, of counsel for plaintiff, and after the decision of the court in this cause had been rendered, tendered an attested copy of a rule of court from the records of the circuit court of Kanawha county, entered therein on the 8th day of December, 1868, and moved the court to file the same in the papers of this cause, and the same is filed accordingly.

The rule referred to in the foregoing order is in the words
92 and figures following, to wit:

"At a circuit court held for Kanawha county, at the court-house thereof, on the 8th day of December, 1868, the following rule is directed to be entered by the court:

Ordered, That in all creditors' suits, by original bill or otherwise, wherein decrees are entered referring the cause to a commissioner to make up, state, and report an account between the creditors, it shall be the duty of such commissioner in his publication of notice to insert a clause therein warning the creditors of the defendant or defendants, by lien or otherwise, to produce and assert before said commissioner such liens or other claims aforesaid before his final report to the court; that upon their failure to do so before such final report all such delinquent creditors, by lien or otherwise, shall be excluded from any participation in the proceeds arising
93 from the sale or sales to be had in the cause until all the liens or other claims produced and asserted as aforesaid shall be fully paid and discharged according to their respective priorities, and that the commissioner aforesaid shall not notice or report any such lien or claim not so produced and asserted, nor shall any such be allowed in the decree distributing the fund until those produced, asserted, and reported are paid and discharged as aforesaid.

A copy.
Teste: THOMAS SWINBURN, *Clerk.*"

And on the same day, to wit, at a district court of the United States for the district of West Virginia held, as aforesaid, on the day and year last aforesaid.

This cause came on this day to be further heard and was argued by counsel, and thereupon, upon consideration thereof, it was adjudged, ordered, and decreed that the exceptions taken and
94 endorsed upon the last report of Master Commissioner Fontaine by McCandless, Means & Co. and the exceptions endorsed on the several reports in this cause by James M. Laidley, as the owner of the Pearce judgment, be, and the same are, sustained to the extent that the judgments of the said McCandless, Means & Co. and the said Pearse jud-ment are hereinafter decreed and allowed, and that all the exceptions taken to the said reports which have not heretofore been disposed of and which are inconsistent with this decree are hereby overruled; and the court, proceeding to ascertain and determine the claims set out in the bill and proceedings in this cause, doth adjudge, order, and decree that the first lien

on the real estate conveyed by Samuel H. Early and others to the said John N. Clarkson by deed dated the 10th day of April, 1855, and upon the remaining proceeds of the real estate sold by Special Commissioner F. A. Lovell on the 25th day of June, 1864, is the cost of this suit in so far as they have not been paid,
95 including in said costs the sum of $250 allowed to James H. Ferguson, Esq., for his services herein rendered as attorney for John Johns, Jr., assignee of the said John N. Clarkson, and also the sum of $300 to the complainant, with interest thereon from the 1st day of June, 1873, which sum was expended by the intestates of the complainant in the prosecution of an appeal in this cause in the court of appeals of this State, and also including therein the sum of $500 to complainant's counsel for their services in the prosecution of this cause, and that the second lien upon the real estate so conveyed by the said Early & others is the sum of $1,288.79, with interest thereon from the 27th day of May, 1881, heretofore decreed to Mrs, Henrian Early, less the sum of $566.95 paid thereon on the 17th day of November, 1881, the said sum of $566.95 being the proceeds of that portion of said real estate sold to the Atlantic
96 and Northwestern Railroad Co., and after the satisfaction of the aforesaid liens; that the liens on the said properties in order of priorities and amounts are as follows, to wit:

1st. Lien judgment of John Slack, assignee of the Commonwealth of Virginia, for	$87 85
2nd. The judgment of the complainant for	796 52
3d. The judgment of J. M. Laidley, assignee of Hurt & Crockett, for	206 72
4th. Judgment of Ogburne for the complainant for	496 77
5th. Judgment of John Slack, assignee of Andrew Malcom, for	49 18
6th. Judgment of J. M. Laidley, assignee of Sam'l C. Pearce, for	1,300 00
7th. Judgment of John Slack, assignee of W. F. & J. H. Goshorn, for	360 11
8th. Judgment of the administrator of Henry Chappel for	1,733 50
9th. Judgments of John Slack, assignee of Kanawha Savings Institution and of James H. Brown, for	98 36
10th. Judgment of John Slack, assignee of Wm. J. Rand	1,757 41
11th. Judgment of J. M. Laidley, assignee of Babitt, Good & Co., for	652 56
12th. Judgment of John Slack, assignee of Tillotson Janney, for	112 46
Of Joseph Bibb for	290 74
97 Of John V. Anderson for	406 03
Of Evermont Ward for	192 18
And of John C. Ruby for	1,513 66
And also two judgments of Jas. H. Brown, amounting to	1,609 35
13th. Judgments of Babitt, Good & Co. for	654 10
14th. Judgments of Putney & Norton for	633 97
And judgment of R. E. Putney, Jr., & Co. for	3,075 20

15th. The following judgments, to wit:

McCandless, Means & Co. for	$1,248 47
Of Francis Thompson, adm'r, for	2,211 62
Of Ferrell & Welch for	140 72

16th. The following judgments, to wit:

Of Robert B. Hamilton for	1,521 69
Of McCandless, Means & Co. for	1,425 87
Of Francis Thompson, adm'r, for	2,224 42
Of J. M. Laidley, assignee of Charles Cevenn, for	1,243 27
And five judgments of James H. Brown, amounting in the aggregate to	7,320 58

With interest on all of said claims, except the costs and the Early claim aforesaid, from the 27th day of May, 1881, until paid.

And it being stated to the court by the attorneys represent-
98 ing the parties to this cause that there is, in their opinion, no possibility of the proceeds of the said properties reaching the claims asserted in this cause, which are subsequent in priority of lien to those hereinbefore established, the court, for the present, does not ascertain or settle any of the said subsequent liens, but retains that portion of this cause for future consideration, in the event that such consideration becomes necessary.

It is further adjudged, ordered, and decreed that Thomas B. Swann, Edward B. Knight, S. A. Miller, and W. Mollohan, who are hereby appointed special commissioners for that purpose, do sell, by way of public auction, to the highest bidder, at the door of the court-house of Kanawha county, West Virginia, the real estate conveyed to the said Clarkson by Sam'l H. Early & others as aforesaid.

* * * * * * *

99 And at another day, to wit:

CLERK'S OFFICE, *April 3rd*, 1883.

This day came the complainant-, by Mess. Miller & Gallaher, their counsel, and tendered their bill of revivor, which is here filed.

The bill "of revivor" referred to in the foregoing order is in the words and figures following, to wit:

"The bill of revivor filed in the United States district court for the district of West Virginia in the suit of Milton Parker's Adm'r *vs.* John N. Clarkson and others, pending in said court, by E. B. Knight, adm'r of Milton Parker, dec'd, against R. E. Putney, Jr., and Moses Norton, late partners in trade as Putney & Norton and as R. E. Putney, Jr., & Co.; Thomas B. Swann, Lewis N. Young, Milton W. Young, John M. Young, Hattie Slack (wife of John Slack, Jr.), America Dix, wife of D. H. K. Dix (the last five named defendants being the heirs-at-law of John D. Young, deceased); John F. Hubbard, adm'r of said John D. Young, dec'd; John F. Hubbard,
100 adm'r of Ezekiel W. Mays, dec'd; Malinda Mays, B. F. Mays, Fanny Roberts, wife of Thomas Roberts; Mary Gilliland, widow of Samuel Gilliland, dec'd; Martha Price, wife of Perry Price;

Ella Groves, wife of William Groves; Kate Harmon, wife of Charles Harmon; Laura Mays and Robert Mays (the last-named nine defendants being the heirs-at-law of Ezekiel W. Mays, dec'd), and Thomas L. Brown, adm'r of Frances Thompson, dec'd.

Hon. John J. Jackson, judge of said court:

Humbly complaining, the complainant, E. B. Knight, adm'r of Milton Parker, dec'd, says that this suit was instituted by Milton Parker in December, 1865, in the circuit court of Kanawha county by a bill in chancery against John N. Clarkson, D. J. W. Clarkson, Jubal Early, trustee, &c.; S. H. Early and wife, A. Crookshanks, J. W. Ogburn, John G. Newman, William W. Newman, S. A. Miller, John B. Johnson, F. N. Reed, N. Fitzhugh, Charles Hedrick, James M. Laidley,
Fayette W. Lovell, commissioner, &c.; Isaac Reed, W. A. Quar-
101 rier, William Hedrick, Anthony Lawson, and others prayed to
be made & made defendants, including Thomas B. Swann, Ezekiel W. Mays, and John D. Young. The prayer of said bill of said Parker was that all the lands and property of the said John N. Clarkson within the jurisdiction of the court be subjected to sale and the proceeds thereof be applied to complainant's claim, &c. Said bill closed with prayer for general relief, &c. Said suit remained for several years in said circuit court, and was, in the year —, removed to this honorable court, where it has been ever since and is now pending. The suit is now in the name of Milton Parker's adm'r, said Parker having, after the institution of the suit, departed this life, and it has been revived in the name of your orator, as such adm'r.

Among the parcels of real estate belonging to John N. Clarkson and liable for his debts and against which a court of equity would
enforce liens is a certain piece or parcel in the town of Charles-
102 ton, West Virginia, which, as hereinafter set forth, was conveyed by said Clarkson to Thomas B. Swann and by said Swann to Ezekiel W. Mays and by said Mays to John D. Young, as will fully appear from the record in this suit. It appears also from the said records, as hereinafter set out more explicitly, that the said Putney & Norton and other creditors had obtained judgment liens and docketed the same against said Clarkson's real estate in Kanawha county before said Clarkson conveyed said last-mentioned real estate, and before and at the very time of such alienation by said Clarkson said judgment liens had attached thereto and were and are such liens as a court of equity will enforce. So far as is known to your orator, all the real estate of John N. Clarkson, or in which he has ever had any interest, has in this suit been subjected to sale for benefit of his creditors, save and except said parcel so conveyed by Clarkson to said Swann.

Your orator's judgments are valid and subsisting liens
103 against said parcel, and, as he verily believes, so are the judgments hereinafter described as belonging to R. E. Putney, Jr., & Co. and to Frances Thompson's adm'r. Said Ezekiel W. Mays and John D. Young both died in or about the year 1872, leaving no will, and John F. Hubbard is now the administrator of each and both of them. Sales have been made under de-

crees of this hon'l- court of all of said Clarkson's real estate liable for his debts except the said real estate above named.

Your orator is advised that a bill of revivor is necessary to proceed against said parcel of land, and this cause should stand revived and stand in the same condition as at the time the abatement occurred from the death of said Young and said Mays.

The following are the unpaid judgments in favor of Milton Parker against John N. Clarkson and which are liens upon the parcel of real estate named herein as sold by said Clarkson to said Swann, both of which judgments have been set up and proven in this cause:

104 A judgment at the spring term, 1857, of said circuit court in favorof Wm. Hedrick, who sued for use and benefit of Milton Parker, for $324.13, with interest from May 10, 1851, & $7.80 costs, & on which execution issued, a forthcoming bond was taken & forfeited, and judgment rendered at fall term of s'd court for $424.66 & $3.22 costs; also one in favor of A. Crookshanks, for use of said Parker, for $61 & costs $7.95, at May term, 1857, of said court, & also one in favor of Milton Parker, at same term of said court, for $484.70 & costs $7.80 *costs;* all of which are fully set out and proven in this cause.

It also appears from the papers in this cause that Putney & Norton recovered in said circuit court, at fall term, 1856, a judgment against D. J. W. Clarkson for $245.05, with legal interest from July 16, 1856, & costs; that thereon execution issued & a forthcoming bond was taken & forfeited & at spring term, 1857, of said court judgment was rendered thereon for penalty thereof against said

105 John N. and D. J. W. Clarkson, to be discharged upon payment of $273.65, with interest from Jan'y 16, 1857, & $3.22 costs; said judgment was docketed as a judgment lien in the office of the clerk of Kanawha county court, January 7th, 1858; that R. E. Putney and Moses Norton, composing late firm of R. E. Putney, Jr., & Co., who sued for Putney & Norton at fall term, 1856, of the said circuit court, recovered judgment against D. J. W. Clarkson for $1,252.00, with interest from July 15, 1856, & costs; that upon said judgment execution issued and a forthcoming bond was taken & forfeited, and at spring term of said court, 1857, judgment was rendered thereon against said D. J. W. Clarkson and John N. Clarkson for the penalty thereof, to be discharged by the payment of the sum of $1,332.75, with interest thereon from January 15, 1857, until paid, and costs $3.22. Said judgment was docketed as a judgment lien in the county court clerk's office of said county on the 7th day of January, 1858.

106 That at the November term, 1856, of the said circuit court Francis Thompson recovered against John N. Clarkson and D. J. W. Clarkson a judgment for $900, with interest thereon from August 12th, 1856, until paid, and $7.51 costs; upon which said judgment an execution was issued and a forthcoming bond given and forfeited, and at the March term, 1857, of said court judgment was rendered thereon against said John N. Clarkson and D. J. W. Clarkson and also against James Clarkson for the penalty thereof, to be discharged by payment of $955.91, with legal interest thereon from

December 27th, 1856, until paid, and $3.48 costs. This judgment was docketed as a judgment lien in the office of the clerk of the county court of Kanawha county on the 5th April, 1858.

That at the February term of said court, 1857, Francis Thompson recovered another judgment against John N. Clarkson and D. J. W. Clarkson for $900, with interest thereon from September 12th, 1856, until paid, and $7.51 costs of suit. On said judgment an
107 execution issued & a forthcoming bond taken and forfeited, and at the July term, 1857, of said court a judgment was rendered thereon against the same defendants and Daniel H. Kline for the penalty thereof, to be discharged by the payment of $971.97, with interest thereon from May 12th, 1857, until paid, and costs of suit, $3.48. Said judgment was docketed as a judgment lien in said Kanawha county clerk's office on the 5th April, 1858.

Complainants further say that nothing has ever been paid upon any of the foregoing judgments either in part or in full, but that all and every part of each of them are subsisting liens upon the real estate owned at the dates, respectively, of their docketing by the said John N. Clarkson; that D. J. W. Clarkson died on the — day of ——, 1874, insolvent; that after the docketing of said judgment liens the said John N. Clarkson and Ann, his wife, by deed dated July 21st, 1858, and recorded in the county court clerk's office
108 of Kanawha on the 29th day of September, 1858, conveyed, in consideration of $2,372.99, to Thos. B. Swann certain real estate in the town of Charleston, in said county, as will appear by a copy of said deed filed and prayed to be read herewith as exhibit; that said Swann, by deed dated January 4th, 1860, and recorded in said office the same day, sold and conveyed to Ezekiel Mays a portion of said real estate, as will appear by a copy of said deed filed as exhibit and prayed to be made part hereof; that said Swann also conveyed the residue (excepting a small portion conveyed to Charles Bryant) of said real estate to said Mays by deed dated 31st January, 1860, and recorded in said clerk's office the same day, as will appear by exhibit filed herewith and prayed to be read as part hereof; that said Mays & wife, by deed dated the 10th day of June, 1864, and recorded in said county clerk's office the 14th June, 1864, sold and conveyed both of the above-named parcels of real estate
109 acquired by him from said Swann to John D. Young, as will appear from exhibit filed herewith and prayed to be read, together with this bill. Copies, duly certified, of all of said deeds and transcripts of said judgments have been filed in this cause & are part thereof.

Complainants now say that said judgments were each of them a binding and valid lien upon all of the said real estate at the time of the above-named conveyances and are still binding and subsisting liens thereon, and that all of said judgments, interest, & costs are unpaid, or any part thereof, and all are, principal, interest, & costs, such valid and subsisting liens as a court of equity will enforce; that the said Ezekiel W. Mays departed this life intestate in the year 1872, and his lawful heirs are his widow, Malinda Mays, B. F. Mays, Fanny Roberts, Mary Gilliland, Martha Price, Ella Groves, Kate

Harmon; Laura Mays, and Robert Mays; that John D. Young
110 died in the year 1872, intestate, and his heirs-at-law are Lewis N. Young, Milton W. Young, John M. Young, Hattie Slack, and America Dix. John F. Hubbard, sheriff of Kanawha county, has been, according to law, appointed & is now adm'r of said John D. Young and Ezekiel Mays, as will appear by Exhibits A & B, filed herewith. Complainant, being remediless at law, files this bill and prays that as to said John D. Young and Ezekiel W. Mays, parties to the original bill in this cause, this suit stand revived as against their personal representatives respectively and heirs-at-law, and that all the parties named as defendants in the caption hereof be made parties defendant and each of them be required to make answer hereto, and to that end that the subpœna of this honorable court be issued against each of them; that complainants' said judgments may be decreed to be subsisting and valid liens upon the above-named real estate conveyed by said Swann to said Mays
111 and by said Mays to said Young, and that a sale of said realty be decreed in satisfaction of their said debt & lien, and that such other and general relief as to the court may seem just and equitable may be granted; and, as in duty, &c., your orator will ever pray, &c.

E. B. KNIGHT,
Adm'r of Milton Parker, Dec'd, by Counsel.

S. A. MILLER,
D. C. GALLAHER,
CHAS. HEDRICK,
Sol's."

And at another day, to wit, at a district court of the United States for the district of West Virginia held at Charleston on Monday, the 7th day of May, A. D. 1883.

This cause came on to be further heard at this term and was argued by counsel, and thereupon, upon consideration thereof,
112 it was ordered, adjudged, and decreed that this cause be, and the same is, revived in the name of E. B. Knight, adm'r, &c., of Milton Parker, dec'd, *versus* all parties heretofore, defendants, as well as John F. Hubbard, adm'r of John D. Young, deceased, Lewis N. Young, Milton W. Young, John M. Young, Hattie Slack, and America Dix, the last-named five being the heirs-at-law of said John D. Young, dec'd; John F. Hubbard, adm'r of Ezekiel W. Mays, dec'd, Melinda Mays, B. F. Mays, Fanny Roberts, Mary Gilliland, Martha Price, Ella Groves, Kate Harmon, Laura Mays, and Robert Mays, the last named being the heirs-at-law of said Ezekiel W. Mays, dec'd, and T. L. Brown, adm'r of Francis Thompson, dec'd, and T. B. Swann; and it is further ordered, adjudged, and decreed that this cause be recommitted to Peter Fontaine, one of the commissioners of this court, to take, state, and report an account showing—

1st. What real estate, if any, or interest in real estate of John N. Clarkson, subject to any of the claims proven in this cause, remains unsold herein.

113 2nd. What real estate, if any, heretofore belonging to said Clarkson is liable for any of his indebtedness proven in this cause?

3rd. The liens, amounts, and priorities of the same upon such real estate.

4th. Any other matter deemed pertinent by the commissioner or which any of the parties may require reported.

But before taking said account said commissioner shall give notice thereof by publication in some newspaper printed in Kanawha county for four successive weeks of the time and place of taking said account; and the defendants named in the amended bill shall have 90 days in which to file before said Com'r Fontaine any answers they may wish to file in this cause, said answers when filed to be subject to any exceptions or objections that may be taken thereto then & thereafter.

114 And at another day, to wit:

Clerk's Office, District Court of the United States for the District of West Virginia, at Charleston, July 16th, 1883.

This day the defendant, T. B. Swann, tendered his separate answer to the bill of revivor in this cause, which is here filed.

The separate answer of T. B. Swann referred to in the foregoing order is in the words and figures following, to wit:

"*Bill of Revivor.*

MILTON PARKER'- ADM'R *v.* J. N. CLARKSON *et als.*

The separate answer of T. B. Swann to said bill of revivor.

For answer this resp. says:

He believes it is true Milton Parker instituted his original suit in this cause in Dec., 1865, against J. N. Clarkson & others; among them Ro. W. Clarkson, as adm'r of James Clarkson, dec'd,

115 who answered the bill (see p. 47 of printed record) on 8 June 1866, and set up the $7,000 debt secured to Jas. Clarkson by J. N. Clarkson in the trust of 14 Aug., 1852. In the answer he says: "It is also true that said debt nor any part thereof has ever been paid, & that the whole sum, with interest, is still due. The trust of 14 Aug., '52, sufficiently marks the lands upon wh- s'd trust is a lien.' J. N. Clarkson has been examined as a witness in this cause. In his deposition endorsed 'X Y,' page 47, he says: 'All the debts secured in the deed of trust of August are paid except the one due to my father.' James Clarkson was his father, and he referred to the $7,000 debt in the trust of Aug., '52. No event has transpired in this cause to show this Jas. Clarkson debt paid, & resp. is advised, informed, & charges that it is still due, owing, and unpaid.

That in this cause a bitter & prolonged controversy has been waged between Early & Clarkson and Clarkson's creditors & Early, which

for the time overshadowed and kept other questions in the cause in abeyance.

116 That so far as resp. is advised no decree of this court made in this cause has in any way touched the lands in the trust of 14 Aug., 1852. It is true that on 21 July, 1858, J. N. Clarkson & wife by deed, a copy of which is filed with the papers of this cause, for the consideration set out in said deed, conveyed to resp. a lot of land in Charleston, set out in said deed. The consideration set out in said deed, $2,372.99, was at the time the full value of this lot. It is now worth over $5,000.

Before resp. w'd agree to purchase and pay for the property he required that Jas. Clarkson & A. W. Quarrier, who held a trust of 14 Aug., '52, upon this lot, should, as part of the contract, execute in his favor a release of their said trust, liens, & debts, which was done, as will appear by a copy of said release made at the time and acknowledged, signed, & recorded, to protect resp. in the enjoyment of the property, all of which appears in the record of this cause; only

117 the equity of redemption was with J. N. Clarkson. Jas. Clarkson, his father, had a big debt and the right to purchase it, and Jas. Clarkson consented to the purchase in this way. He had the perfect right to do it. It was his, *his* the just lien, with the small debts of A. W. Quarrier and possibly the small debt of F. Noyes upon the property, and he had the perfect right to assign it, quitclaim, transfer, or release. No other creditor of J. N. Clarkson was hurt thereby. It was to that extent an extinguishment of his prior liens & beneficial to the creditors intermediate between him and resp. debt, which was a subsequent lien.

It was certainly competent for him to yield his prior lien in favor of a subsequent lienor without arousing the jealousies or inflicting a wrong upon intermediate lienors or creating for them a priority. This — did not have, and which he did not intend to give to them. It is certainly competent for parties to agree to anything among themselves which does not injure others.

118 Resp. is advised the Chappell debt of some $1,850 was not docketed before his deed of 21 July, '58, and yet compl'ts have stood by and allowed the proceeds of other lands of J. N. Clarkson sold in this cause to be applied to pay the Chappell debt.

The release of A. W. Quarrier & Jas. Clarkson, of 21 July, '58, is a contract of warranty of title to resp. of s'd lot, so far as their prior liens of trust could create and make valid such warranty. That was the plain intention and meaning of said deed & release of 21 July, '58; if not, it had no meaning or intent known to resp. If not carried out resp. ought to be restored to *statue quo*, which cannot be done now.

The intermediate judgments *is* a lien of inferior equity to J. Clarkson & A. W. Quarrier'- prior trust, and in a court of equity no event has happened to change their relations, except as above set out, in favor of resp.; but for this release and Swann's act in se-

119 curing it the creditors of Clarkson would not have this property to look to for their debts, & yet they ask to injure resp.

for what did not injure them. These compl's ask & must first do equity. This release is the same in effect as if the C. G. trust had united in the deed to resp. The court will carry out the plain intent of all the parties.

The object of the release was to save to Swann the title paid from the judgments against J. N. C. after 14 Aug. '52. The trust was intended to follow the release, quitclaim, or assignment. It was intended to foreclose the mortgage by all parties on this lot, the same as if it had been sold & resp. had purchased the lot under the Jas. Clarkson trust. The united grant & release gave title to resp. to the lot. Resp. took immediate possession of this lot after 21 July, '58, and has by himself & those under him held it ever since, & resp. submits comp't's claim is stale. Resp. had the right to ask the court to clear his title of these clouds, but time has done it for him. The strength of the trust and equity of redemption unite *or* the
120 deed to resp. Resp. is advised that Jas. Clarkson, by last will, gave this $7,000 debt to his son, Ro. W. Clarkson, and his daughter, Margaret Clarkson, and they are now looking in this suit to enforce the payment thereof on the other lands in the trust of 14 Aug., 1852, subject to a credit for the amount in deed of 21 July, '58, aforesaid.

They live one in the State of Missouri and one in the State of Ohio, and are now asking in this suit in this court a proper decree for the collection of their money out of the lands aforesaid, subject to the credit aforesaid.

That all the questions raised by s'd bill of revivor have been already adjudicated in this cause by final decree.

T. B. SWANN.

Taken, sworn to, & subscribed before me this 16th day of July, 1883.

L. E. McWHORTER,
Notary Public, Kan'a Co., W. Va."

121 And at another day, to wit, at a district court of the United States for the district of West Virginia held, as aforesaid, on Thursday, the 13th day of November, 1884.

This day the defendant tendered his two several demurrers, marked No. 1, No. 2, and the same are ordered to be filed and set down for argument.

Demurrer No. 1, referred to in the foregoing order, is in the words and figures following, to wit:

"MILTON PARKER'S ADM'R and Others
vs.
JNO. N. CLARKSON and Others. } In Ch'y.

The defendant, T. B. Swann, demurs to the bill of revivor exhibited against him and others by Parker's adm'r in this cause and says the compl. has not in and by his bill made or stated such a case as

doth or ought to entitle him to any such discovery or relief
122 as is thereby sought and prayed for from or against this defendant, and therefore, and for other good causes of demurrer in said bill contained, this defendant demands judgment of this hon'l- court whether he shall be compelled to make any further or other answer to said bill, or any the matters and things therein contained, and prays to be hence dismissed with his costs in this behalf sustained.

T. B. SWANN.

I hereby make affidavit that this demurrer is not interposed for delay.
12th Nov., 1884.

T. B. SWANN.

Taken, sworn to, & subscribed before me the 12th No., '84.
JASPER Y. MOORE,
Clerk Dist. C't U. S., D. W. Va.

I hereby certify that in my opinion this demurrer is well founded in law.

JNO. S. SWANN, *Sol.*"

123 Demurrer No. 2, referred to in the foregoing order, is in the words and figures following, to wit:

"MILTON PARKER'S ADM'R and Others
vs.
JNO. N. CLARKSON and Others. } In Ch'y.

The demurrer of Thomas B. Swann, defendant, to the bill of revivor exhibited against him and others by Parker's adm'r.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said complainants' bill to be true in such manner and form as the same are therein set forth and alleged, demurs thereto, and for cause of demurrer shows that this bill—a bill of revivor—does not lie in this cause, because the decree heretofore rendered in this cause by this honorable court was final, and the matters and things sought to be set up and set out in this s'd bill of revivor were finally adjudicated as between all parties, and especially as between the plaintiffs and defendants,
124 among other things, the validity of the deed from —— Clarkson to this defendant and from him to Mays and from Mays to Young, as well as the release in favor of this defendant and all other questions arising in connection therewith, and also all questions concerning the deed of trust in favor of R. W. Clarkson set out in the proceeding- and in said Clarkson's answer, and all other questions arising between the parties. Wherefore this defendant demands judgment of this hon'l- court whether he shall be com-

pelled to make any further or other answer to said bill of any of the matters or things therein contained, and prays to be hence dismissed with his reasonable costs, &c.

T. B. SWANN.

I hereby certify that in my opinion this demurrer is well founded in law.

JNO. S. SWANN, *Sol.*

125 I hereby make affidavit that this demurrer is not interposed for delay.
12 Nov., 1884.

T. B. SWANN.

Taken, sworn to, & subscribed before me this 12 Nov., 1884.
JASPER Y. MOORE,
Clerk Dist. C't U. S., D. W. V."

And at another day, to wit, at a district court of the United States for the district of West Virginia, held as aforesaid, on Thursday, the 20th day of November, A. D. 1884.

This cause came on this day to be further heard upon the papers heretofore read herein, & was argued by counsel, and it appearing that process has been duly served upon all parties as prayed for in the bill of revivor, thereupon T. B. Swann, by his counsel, John S. Swann, appeared and moved the court to strike from the docket & the record in this cause the bill of revivor filed herein by Milton Parker's
126 adm'r, which motion the court doth overrule; and thereupon the said T. B. Swann also asked leave of the court to withdraw his answer for the purpose of filing his two demurrers; and, upon argument, the court doth refuse said leave, and T. B. Swann thereupon tendered two demurrers to said bill of revivor, to the filing of which the complainant objected, & upon argument heard thereon the court doth decide that said demurrers were not well taken & sustains said objections; and the said T. B. Swann having asked leave of the court to tender an amended answer, the court doth take time to consider thereof, and the further hearing of this cause is set down for argument Friday next.

[In pencil:] Here insert 2 demurrers, but not yet found in the papers.

127 And at another day, to wit, at a district court of the United States for the district of West Virginia held, as aforesaid, on Saturday, the 22nd day of November, A. D. 1884.

This day T. B. Swann tendered his exceptions to the bill of revivor of Milton Parker's adm'r filed in this cause, which exceptions, being considered by the court, are and each of them overruled; and thereupon said Swann tendered his amended answer to the bill of revivor filed in this cause by complainant, and there being objections made thereto in open court by complainant, by coun-

sel, the said amended answer is filed subject to said objections, and complainant replies generally thereto; and it appearing that complainant inadvertently omitted to file replication to the answer of said Swann filed heretofore at rules, good cause having been shown therefor, it is ordered that complainant has leave to file general replication thereto *nunc pro tunc*, and complainant replies
128 generally to said answer, and leave is granted to complainant to amend his bill of revivor and & make additional parties thereto & to issue process thereon, & this cause is remanded to rules for that purpose.

The exceptions referred to in the foregoing order are in the words and figures following, to wit:

"M. PARKER'S ADM'R *vs.* JNO. M. CLARKSON and Others.

R. W. Clarkson, as executor of James Clarkson, dec'd, and T. B. Swann and the heirs of J. D. Young, by Ferguson and Swann, except to any action in this cause upon any part thereof, and specially upon the reports of Com'r Fontaine, because Charles Bryant has *been* not been made a party defendant thereto, either to original bill or bill of revivor, and the bill of revivor on its face shows that he is a necessary party thereto, and because he is a
129 necessary party thereto, as well as the executor of James Clarkson, and Jno. M. Clarkson, who are also necessary parties to the bill of revivor and are not made parties thereto; that T. B. Swann conveyed the lot purchased from J. N. Clarkson and wife to E. W. Mays and s'd Charles Bryant by several deeds of record prior to the filing of the original bill in this cause in 1865.

FERGUSON AND SWANN, *Att'ys.*"

The amended answer referred to in the foregoing order is in the words and figures following, to wit:

"PARKER'S ADM'R
vs.
CLARKSON *et al.* } In Chancery.

Resp., T. B. Swann, for answer to the original bill filed in this cause by M. Parker, d'c'd, says that he adopts as part of his answer to their bill his answer filed in this cause 16 July, '83, to compl't's bill of revivor filed herein, & asks that this answer may be read as
130 an additional & amended answer to the s'd bill of revivor as well, and in supplement to the matters set out in that answer. Resp. says that at the time he agreed with J. N. Clarkson to purchase of him the lot set out in the deed of 21 July, 1858, upon the face of which Jas. Clarkson made his release to resp. in writing, also filed in this cause, it was distinctly understood & agreed by & between resp. & J. N. & James Clarkson, as part of the s'd contract of purchase, that s'd lot set out in s'd deed & release should be made secure to s'd resp. by the interest James Clarkson held in the trust deed of 14 Aug., 1852, from J. N. Clarkson to J. J. Williams, trustee, set out in this cause, if necessary, to protect Swann's title to

same from other heirs on s'd lot. With that view the release was intended by all parties to s'd deed & release as an assignment from Jas. Clarkson to resp. of so much of s'd trust as w'd suit their purpose.

The release was in favor of resp. & no one else. If the
131 release does not carry out that view it falls short of the distinct intention of resp. & J. N. & Jas. Clarkson. Said release was intended for that purpose as an assignment, if necessary to protect resp's title to said lot, of so much of the Jas. Clarkson trust as w'd secure to resp. the perfect title to s'd lot. Hence the peculiar form of the release in writing — the benefits to be derived therefrom to resp., as it was the absolute purpose of J. N. & Jas. Clarkson & resp. at the time. It was the intention & agreement of J. N. & Jas. Clarkson & resp. at the time that the entire strength of the trust of 14 Aug., 1852, owned by Jas. Clarkson, should be thrown on the title of resp. to this lot if necessary to protect same from all prior liens thereon. The s'd trust of 14 Aug., 1852, was thought to be the oldest lien on s'd lot. The release was intended as an assignment as well, & hence the peculiar form of the release. Resp. thought he expressed this in his answer filed to the bill of revivor when
132 he said James Clarkson consented to the purchase of this lot in this way & had the perfect right to assign it. * * * It was certainly competent for him to file his prior lien in favor of a subsequent lienor * * * without creating for intermediate lienor a priority they did not have & which he did not intend to give to them. The object of the release was to save to resp. the title pure from the judgments against J. N. Clarkson after 14 Aug., 1852, by subs-ituting resp. to his own (James Clarkson's own) lien on this lot under the s'd trust of 14 Aug., 1852, which was prior to all other liens on said lot. 'The trust was intended to protect the release, just claim, or assignment. It was intented to foreclose the mortgage by all parties on this lot the same as if it had been sold & resp. had purchased the lot under the James Clarkson trust of 14 Aug., 1852.' Resp. asks the court to carry out the distinct intention of all parties in this matter.

T. B. SWANN.

133 Taken, sworn to, & subscribed before me this Nov. 21, 1884.

JOSEPH RUFFNER,
U. S. Commissioner, Dist. W. Va."

And at another day, to wit, at a district court of the United States for the district of West Virginia held, as aforesaid, on Tuesday, the 26th day of May, A. D. 1885.

Complainant, on motion, has leave of the court to amend his original bill of complaint in this cause, and thereupon complainant tendered his said amended bill, which is ordered to be filed, and the defendants have leave to file answer to said bill within 60 days from the rising of the court; and it appearing that there are no new parties made by said amended bill the court decides that process on said bill is unnecessary.

The following is the amended bill referred to in the fore-
134 going order, and is in the words and figures following, to wit:

"MILTON PARKER'S ADM'R
vs.
JOHN N. CLARKSON & Others. } In Chancery.

The amended bill of Milton Parker's adm'r. filed in the district court of the United States for the district of W. Va., against John N. Clarkson and others.

Hon. John J. Jackson, judge of said court:

By way of amendment to the original bill in this cause, complainant says that since the execution of the trust deed from John N. Clarkson to John J. Williams, trustee, set out in the original bill in this cause, a copy of which was filed therewith as Exhibit No. 1, James Clarkson and A. W. Quarrier, *cestries que trust* therein, on the 21st day of July, 1858, released 'any and all trusts or other liens'
135 they or either of them had upon the real estate sold by John Clarkson, as stated in said original bill, by deed of July 21, 1858, to T. B. Swann, a copy of which last-named deed is filed with the original bill herein as an exhibit, and said release is also filed with, made part of, & incorporated in said last-named exhibit & as part of the transaction, and complainant now says that by reason thereof & by operation of said release the debts of said Quarrier and James Clarkson upon the said real estate so conveyed to T. B. Swann were as to said property released, paid off, and entirely extinguished, and the effect thereof was to relieve said real estate of said trust debts of said Clarkson and Quarrier and leave it subject to the debts of the judgment creditors of John N. Clarkson according to their priorities. Complainant prays that said real estate so sold to T. B. Swann & by him conveyed to Ezekiel W. Mays & by said Mays to John D. Young may be decreed to be sold and the proceeds applied to such judgment creditors as may be entitled; that
136 the parties defendant to the original bill & those who have come in since be made parties defendant hereto & required to answer thereto, and that process be issued and for such other & general relief as to the court may — proper, &c., &c.

E. B. KNIGHT,
Adm'r of Milton Parker.

MILLER & GALLAHER &
J. F. BROWN, *Sol's.*"

137 And at another day, to wit, at a district court of the United States for the district of West Virginia held at Charleston on Tuesday, the 26th day of May, 1885.

This day Ro. W. Clarkson, as ex. of James Clarkson, dec'd, tendered his petition in this cause, marked D, which is ordered to be filed.

The petition referred to in the foregoing order is in the words and figures following, to wit:

"U. S. Court at Charleston, W. Va. In Chancery.

PARKER'S ADM'R *vs.* J. N. CLARKSON *et al.*

Ro. W. Clarkson, as ex'or of James Clarkson, dec'd, respectfully represents to the court in this his petition that, after the process to answer comp't's bill in this cause was served on him, he employed the Hon. G. W. Summers to appear for & protect the interests of the estate of Jas. Clarkson therein; that Judge Summers prepared & filed his answer, as such ex'or, to comp't's bill, which still
138 remains in the file. Afterwards Judge Summers died. He then engaged the services of other eminent counsel practising at this court to represent his interests as ex'r in this case. Comp't's bill only charged that a part of the debt due from J. N. Clarkson to Jas. Clarkson was paid. The answer to the bill was filed 8 June, 1866, & denied any part of it was paid. After filing s'd answer y'r petitioner, R. W. Clarkson, moved to & has lived in Missouri, where he married; that the entire interest of Jas. Clarkson's estate in this suit remained in the hands of his counsel, in whom he then & still has entire confidence; that in the year 1880 he & his sister Margaret engaged additional counsel to represent the estate of Jas. Clarkson in this case (see her petition filed in this case), to aid in their recovery of the debt due to Jas. Clarkson's estate in this cause, not understanding the great delay in reaching a conclusion of the matter; that up to 1883 he thought his interest in this matter was securing the strictest attention from his counsel, & he does not
139 now intimate they were not, but, if not, he don't want to be prejudiced in his rights here by *setting* out neglect on the part of counsel, and which he does not think was intended. The trust securing this debt had been favorably noticed in a former report filed by Com'r Fontaine in this cause, & there had been no evidence at all against the claim, but the deposition of J. N. Clarkson in 'X Y' proves this was the only debt secured by that trust so reported that had not been paid—that this debt had not been paid.

For many y-ars last *point* the attention of court & counsel engaged in this case had been directed to settlement of trust & judgment liens on the farm of J. N. Clarkson below Charleston, & seems not to have been specially called to other branches of the case in anywise until that branch was disposed of & ended. To settle these liens regard for *general references* to the master, and the attention of all counsel was specially directed to this branch of the case.
140 The order selling the farm only passed on matters of *piling* the farm & specially reserved all other questions in the cause.

Your petitioner asks the court to allow this claim of Jas. Clarkson's estate to be brought before the court for final action by special reference as in same case.

Reports No-. 4 & 5 were specially directed to judgments & claims affecting the same, in which class this claim of Jno. Clarkson did not rank.

Y'r petitioner has not been guilty of negligence. He knew nothing of this state of affairs until lately advised thereof. His sister Margaret owns — if this claim under the will of Jas. Clarkson — that he certainly never intended to be wanting in duty to his sister in this matter. It seemed no steps c'd be taken in the case until the farm was sold. The release to T. B. Swann from Jas. Clarkson was confined to him, & not intended to benefit others. It was intended to protect Swann's title against all liens on this lot, if it does
141 not have that effect. Resp. claims the original trust lien on this s'd lot sold by J. N. Clarkson to T. B. Swann, & asks that the same be subjected to his debt. He asks to be made a party d'f't to the bill of revivor filed in this cause by Parker's adm'r, with liberty to answer same as soon as it can be done.

That Geo. Jeffries, def't, is dead, intestate, leaving heirs asked to be made def'ts to this suit. The names of his children & heirs *is* Alice Jeffries, John Jeffries; Julia, who married Harry Rigg; Mary, who married —— Gustin, & Thomas Jeffries.

RO. W. CLARKSON,
Ex. of Jas. Clarkson, by Counsel.

FERGUSON,
SWANN & SWANN, *Sol's.*"

142 And at another day, to wit, at a district court of the United States for the district of West Virginia held, as aforesaid, on Wednesday, the 4th day of November, A. D. 1885.

It is ordered that the demurrers of T. B. Swann and of the ex'or of James Clarkson, dec'd, be, and the same are hereby, set down for argument Friday, Nov. 6th, 1885.

The demurrer of T. B. Swann, referred to in the foregoing order, is in the words and figures following, to wit:

"E. B. KNIGHT, Adm'r of M. Parker, Dec'd, *vs.* JOHN N. CLARKSON and Others. } In Chancery.

The demurrer of Thos. B. Swann to the amended bill of E. B. Knight, adm'r of M. Parker, dec'd.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said complainant's
143 amended bill to be true in such manner and form as the same are therein set forth and alleged, demurs thereto and for cause of demurrer showeth—

That it appears from the original bill of said M. Parker, deceased, filed in this cause, that George Jeffries was made a party thereto and was a necessary party for the reason that he was a purchaser by deed of record in Kanawha county clerk's office, filed with said original bill, from the defendant, John N. Clarkson, of a part and largely of the most valuable part of the lands conveyed in trust to secure the debt due said James Clarkson by deed filed with the said

original bill; that it appears from the record that said George Jeffries has departed this life and his death has been suggested on the record; that it appears from the record that his heirs-at-law are his children, Thomas E. Jeffries, John Jeffries, Alice Jeffries, Julia M. Jeffries, who married Harry Riggs, and Mary Jeffries, who
144 married —— Guston, all of whom are now living; — they and none of them are made parties to the amended bill, and that they are and each of them is a necessary party thereto, being interested in the suit, as appears on the record, and no proper or binding decree can be made in this cause without making them parties.

Wherefore, and for divers other errors and imperfections in said amended bill, this defendant demands judgment of this honorable court whether he should be compelled to make any further or other answer to said amended bill or any of the matters and things therein contained, and pray to be hence dismissed with his reasonable costs in this behalf sustained.

I hereby certify that, in my opinion, this demurrer is well founded in point of law.

JNO. S. SWANN, *Att'y.*

STATE OF WEST VIRGINIA, *Kanawha County,* } *To wit:*

145 Thos. B. Swann, def't in the above cause, this day made oath before me that the above demurrer is not interposed for delay.

T. B. SWANN.

Taken, sworn to, & subscribed before me this 24th day of June, 1885.

[L. S.] FERD. R. SWANN,
Notary Public, Kanawha Co., W. Va."

And at another day, to wit, at a district court of the United States for the district of West Virginia held at Charleston on Friday, the 4th day of December, A. D. 1885.

This day the complainant tendered a second bill of revivor against the heirs-at-law of George Jeffries, deceased, and asked leave to file the same, which is ordered to be done; and thereupon, on his motion, the said bill of revivor is remanded to rules, with leave
146 to complainant to sue out process against all the defendants named therein that he may see fit to serve.

The bill of revivor referred to in the foregoing order is in the words and figures following, to wit:

"In Chancery of U. S. D. Court at Charleston, W. Va.

E. B. KNIGHT, as Adm'r of Milton Parker, Dec'd, Compl't,

vs.

J. N. CLARKSON *et als.*, Def'ts.

To the Hon. J. J. Jackson, judge D. C. U. S. for D. of W. V.:

Humbly complaining, your orator, E. B. Knight, as adm'r of M. Parker, dec'd, respectfully shows to y'r honor that Milton Parker, dec'd, heretofore exhibited his original bill in this hon'l. court (which was revived in the name of y'r orator as his adm'r) against J. N. Clarkson *et als.*; that afterwards, to suit the needs of the cause, y'r orator filed his amended & bill of revivor in this cause, all of which will fully appear in the record of this cause, & for
147 purposes and with prayers therein set out in full; and y'r orator further shows that process duly issued on s'd bills against s'd def'ts, and they or some of them have fully answered same; that it already appears in the record of this cause that George Jeffries, one of the def'ts named in it, is dead, leaving the following his heirs-at-law, to wit: Alice, Julia, Mary, Thomas, & John Jeffries, his children & heirs-at-law. He died intestate, leaving a widow, Mrs. Maria L. Jeffries, who also qualified as his adm'x. Julia married Harry Rigg; Mary married —— Gustin; that the said suit and proceedings have become abated as to the said George Jeffries by his death.

Your orator is advised he has the right to have the suit revived against the widow, adm'r, & heirs-at-law of said George Jeffries and to have this cause put in the same state and condition as the same was in previous to the death of said Geo. Jeffries; that
148 the record shows and the fact is the adm'r, widow, and heirs of said Geo. Jeffries are material & necessary parties to the determination of the matters in litigation in this cause and of any part thereof. To this end y'r orator as such adm'r asks that Maria L. Jeffries in her own right and as adm'x of George Jeffries, dec'd, and Alice Jeffries, H. Rigg, & Julia, his wife, —— Gustin, and Mary, his wife, and John Jeffries, and Thomas Jeffries may be made parties defendants by proper writs to this bill of revivor and required to answer the same, and that this suit shall stand and be in the same plight and condition as it was in at the time of the abatement thereof, caused by the death of s'd G. Jeffries; and your orator asks for general relief, & will ever pray; wherefore, &c.

E. B. KNIGHT,
As Adm'r of M. Parker, Dec'd, by Counsel.

FURGUSON.
T. B. SWANN."

149 And now, at this day, to wit, at a district court of the United States for the district of West Virginia held at Charleston on Saturday, the 12th day of December, 1885, the same day and year first herein mentioned.

This cause came on this day to be further heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was adjudged, ordered, and decreed that the several demurrers in this cause to the amended bill of complaint filed by T. B. Swann and Robert Clarkson, adm'r of James Clarkson, dec'd, respectively, be, and the same are — each of them *are* hereby, overruled.

And thereupon the defendants, J. M. Young and M. W. Young and America Dix, tendered their several demurrers to the said amended bill and the bill of revivor filed by complainant against the heirs of J. D. Young, dec'd, and others, which last-named demurrers are filed, and, being set down for argument and being argued by counsel, are, & each of them — hereby, overruled; and thereupon T. B. Swann and Robert Clarkson, administrator
150 of James Clarkson, and J. M. Young and M. W. Young tendered their separate pleas in writing, to the filing of which complainant objected; which objections, being considered by the court, are overruled, and said pleas are ordered to be filed, and the complainant replied generally to each and every of said pleas, and the matters arising thereon being argued by counsel and considered by the court, the court doth find the issues upon each and all of said pleas for the complainant.

And thereupon the defendants, Robert Clarkson, administrator of James Clarkson, dec'd, T. B. Swann, M. W. Young, and J. M. Young, filed their several answers, to which & to each of which complainant replied generally.

And the defendant, America Dix, not having asked leave to further plead or answer to said bill of revivor or amended bill or file any plea or answer to either of said bills, and the other defendants to said bills having been duly served with process and having failed to plead to or answer said bills or either of them, the
151 same are taken as confessed as to them and each of them.

Thereupon this cause came on to be heard upon the proceedings had therein and was argued by counsel; upon consideration of all which the court doth decide that so much of the real estate situate in the city of Charleston, Kanawha county, in the State of West Virginia, and described in the deeds of John N. Clarkson & wife to T. B. Swann, dated July 21, 1858, excepting the property sold by Swann to Bryant and of T. B. Swann to E. W. Mays, dated 4th January, 1860, and of said Swann to said Mays, dated January 31st, 1860, and of E. W. Mays & wife to John D. Young, dated 10th June, 1864, as set forth in these proceedings, is subject to the liens of the judgments against John N. Clarkson, as herein and hereby ascertained, and in the following order as to priorities and amounts:

1st lien. The judgments of Babbitt, Goode & Co. for $654.10; the judgment of Putney & Norton for $633.97, and the judgment of R. E. Putney, Jr., & Co. for $3,075.20, *pro rata*.

152 2nd lien is the judgment of Francis Thompson for $2,211.62.

3rd lien *are* the judgments *pro rata* of—

Francis Thompson for	$2,224 42
J. H. Brown for	821 91
J. H. Brown for	716 57

J. H. Brown for	$827 82
J. H. Brown for	979 79
J. H. Brown for	529 76
J. H. Brown for	3,982 44

4th lien *are pro rata* the following:

The judgments of Hedrick for Milton Parker for	$967 18
Of Milton Parker for	1,233 75
Of C. G. Hussey & Co. for	8,080 36
Of C. G. Hussey & Co. for	269 33

with interest upon all and each of said claims from the 18th day of October, 1878, until paid.

And it appearing to the court from the papers in this cause that the debts reported as liens prior to those hereinbefore decreed on said lands, to wit, the judgments of Milton Parker for $796.52, and of Ogburn for Milton Parker for $496.77, and Andrew Malcolm for $—, and Babbitt, Goode & Co. for $652.56, as ascertained and
153 reported in Commissioner Fontaine's report No. 3, dated March 12th, 1879, have been fully paid off and discharged out of funds arising in this cause; and it being stated to the court by the attorneys representing the parties to this cause that there is, in their opinion, no possibility of the proceeds of said properties reaching the claims asserted in this cause, which are subsequent in priority of lien to those hereinbefore decreed, the court for the present doth not ascertain or settle any of the said subsequent liens.

It is further adjudged, ordered, and decreed that if the defendant, John N. Clarkson, or some one for him, do not pay to the judgment creditors whose claims are adjudicated by this decree and which are unpaid the amounts of their several judgments, with interest thereon from the said 18th day of October, 1878, within 30 days from the date of this decree, that then D. C. Gallaher and J. F. Brown, who are hereby appointed special commissioners for that purpose, do sell, by way of public auction, to the highest bidder, at
154 the front door of the court-house of Kanawha county, West Virginia, the real estate in this decree described upon the following terms: Ten per cent. of the purchase-money in cash, or so much as may be necessary to pay *to* the unpaid costs of this suit and expenses of sale, and the residue thereof payable in three equal instalments at one, two, and three years from date of sale, with interest from said day, requiring of the purchaser or purchasers his or their notes for the said deferred instalments, with personal security satisfactory to said special commissioners; and said special commissioners shall, in their discretion, sell said real estate in gross or in parcels, whichever way will realize the best bids for said real estate in the aggregate.

And it is further adjudged, ordered, and decreed that before proceeding to sell under this decree said special commissioners shall give notice of the time, place, and terms thereof by publication made in the Kanawha Gazette, a newspaper published in
155 Charleston, in this district, for a period of thirty days, and

such other notice, by advertizement or otherwise, as they may see fit, and before receiving any money under this decree said special commissioners shall give bond before the clerk of this court in the penalty of $2,000, to be approved by said clerk, with conditions similar to those required of special commissioners making sales under the decrees of courts of said State.

And upon motion of the defendants, T. B. Swann and the heirs of J. D. Young, they have leave to file a petition for a rehearing of the foregoing decree, such petition to be limited to any error committed by the court in passing upon the pleas of the statute of limitations.

And the said defendants tendered a petition for compensation for permanent improvements put upon the property above decreed to be sold, which last-named petition is ordered to be filed; and upon the motion of said heirs the court, without adjudicating any questions arising upon said petition, doth refer the same to Peter
156 Fontaine, one of the commissioners of this court, to make a report showing what permanent improvements the said Youngs have erected upon said property, and when, and the present value thereof, and to what extent, if any, they add to the value of said property, and also what taxes they have paid thereon and the value of the rents, issues, and profits of said property, excluding therefrom the rental value of the improvements put thereon by the said J. D. Young & his heirs since the ancestor of the said Youngs acquired title thereto and the possession thereof, and such other matter as the commissioners deems pertinent & any of the parties may require; and the commissioner is required to give ten days' notice of the time and place of making said report to the complainant and the heirs of said Young; and said Com'r Fontaine shall file his said report on or before the 5th day of January, 1886, and in the event of a sale of said property the court reserves for future consideration the question as to what part, if any, of the costs of this cause
157 heretofore paid shall be paid out of the proceeds arising from said sale.

And the defendants, L. N. Young, M. W. Young, J. M. Young, H. Slack, A. Dix, heirs-at-law of J. D. Young, J. N. Clarkson, and Thomas B. Swann, desiring an appeal to the Supreme Court of the United States from this decree, said appeal is allowed said defendants upon they or some one for them entering into bond before the judge of this court in the sum of $5,000, conditioned according to law, and the court doth certify that the amount in controversy in this cause, exclusive of interest and costs, exceeds the sum of five thousand dollars, which bond is here given and approved by the court.

And this decree having been directed to be entered the 3rd day of December, 1885, and it having been omitted, it is ordered that it be entered of record *nunc pro tunc*.

The demurrer of America Dix referred to in the decree
158 last aforesaid is in the words and figures following, to wit:

"M. PARKER'S ADM'R
vs.
J. N. CLARKSON *et al.* } In Chancery.

The defendants, America Dix and D. H. K. Dix, her husband, demur to the bill of revivor of the plaintiff filed in this cause on the 3rd day of April, 1883, and to plaintiff's amended bill filed herein on the — day of May, 1885, and for cause of demurrer say—

(1.) That the said bill of revivor was not filed in said cause for more than ten years after the death of J. D. Young, from whom the said America Dix and the other heirs-at-law of said J. D. Young derive title.

(2.) That the said amended bill was not filed in the cause for nearly twenty-five years after the date and recordation of the deed from Ezekiel Mays to J. D. Young, the ancestor of said America Dix, from — she and the other heirs of said Young derive title; wherefore, &c.

159 We certify that, in our judgment, the above demurrer is well founded in law and not interposed for delay.

KNIGHT & COUCH, *Att'ys.*"

The plea of T. B. Swann referred to in the decree last aforesaid is in the words and figures following, to wit:

"*The Plea of T. B. Swann to the Amended Bill Filed in This Cause by said Plaintiff.*

E. B. KNIGHT, Adm'r of M. Parker, Dec'd,
vs.
J. N. CLARKSON, &c. } In Ch.

This def't, by protestation, not confessing or acknowledging all or any of the matters and things in said compl. s'd amended bill mentioned and contained to be true in such manner and form as the same are therein set forth and alleged, for plea to said amended bill, says—

1. That the original bill filed in this cause does not pre-
160 tend or claim that s'd Parker ever had any claim, lien, or demand adverse to the said release executed to this defendant by the mortgagor, J. N. Clarkson, filed with the original bill, nor to s'd defendant's title by virtue of said release, and this appears also from the records in this cause.

2. And this defendant further says that said Parker, at the time of filing his s'd original bill, had no claim, lien, or demand adverse to the trust executed and filed with his s'd original bill in favor of s'd beneficiary, James Clarkson, and that all the debts named in said trust deed, except the debt due James Clarkson, had been paid before s'd amended bill was filed, as appears from proof on record in this cause.

3. This defendant pleads the statute of limitations to all matters set up in s'd amended & original bills.

4. And, further, that from the records in this cause it appears that all claims and demands on the part of said Parker set up in the original bill filed in this cause against the def., J. N. Clark-
161 son, prior to s'd trust deed and all debts named in said trust deed except the debt in favor of James Clarkson have been paid, and that s'd Parker's adm'r had no claim or demand whatever against s'd Jno. M. Clarkson'- estate or against this defendant prior to s'd trust and no interest whatever in the matter of s'd amended bill that can be seen on its face; and thereupon def. pleads each and every allegation hereinabove named to said compl. s'd amended bill, and prays the judgment of this hon'l- court whether he shall be compelled to make any further answer to s'd amended bill, and to be dismissed with his costs.

T. B. SWANN.

Taken, sworn to, & subscribed before me this 27 day Nov., 1885.
—— ——."

The plea of J. M. Young referred to in the decree last
162 aforesaid is in the words and figures following, to wit:

"*The Plea of —— Young, Def., to the Amended Bill of E. B. Knight, Adm'r of M. Parker, Dec'd, Compl.*

M. PARKER'S ADM'R
vs.
JNO. M. CLARKSON and Others. } In Chancery.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in s'd compl. amended bill to be true in such sort, manner, and form as the same are therein set forth and alleged, for plea to s'd amended bill, says—

That he derived title to the said lot of land through J. D. Young, who derived title from E. Mays by deed from T. B. Swann, dated 31 J'n'y, 1860, and Swann from J. N. Clarkson, as stated in the record, as also from James Clarkson by deed and release dated ——
—, 1858; that he and s'd Young, from whom he derived title,
163 and Mays, from whom s'd Young derived title, have been in possession under s'd title from 31 J'n'y, 1860, and Swann had been in possession under s'd deed and s'd release from this date, undisturbed and unquestioned; and thereupon this defendant pleads the statute of limitations in *bill* of complain. s'd amended bill, and prays the judgment of this hon'l- court whether he shall be compelled to make any further answer to s'd amended bill and to be hence dismissed with his costs and charges.

And for further plea this defendant says that his title under Young and Young's title under Mays are nowhere called in question or disputed either in s'd original bill nor in s'd amended bill, as will appear by their inspection. He therefore prays the judgment of this hon'l- court whether he shall be compelled to make any further answer to s'd amended bill and to be hence dismissed.

And for further plea this defendant says that he claims the protection of the statute of limitations under the title derived under the deed from E. Mays, who has been in possession thereunder,
164 or Young after him, from and since 31 Jn'y, 1860; he therefore prays, &c.

And for further plea this defendant says that this amended bill shows latches in its face, and he therefore pleads and relys on the latches, and prays the judgment of this court whether he shall be compelled to make any further answer to s'd amended bill and to be hence dismissed with his costs.

I certify that in *my* opinion the above pleas are well founded in point of law.

KNIGHT & COUCH, *Sol's.*

I, J. M. Young, affirm that the above pleas and each of them are true in point of fact and are not interposed for the purposes of delay.

Given under my hand this 28th day of November, 1885.

JASPER Y. MOORE,
Clerk D. C. U. S., D. W. V."

165 The plea of T. B. Swann, referred to in the decree last aforesaid, is in the words and figures following, to wit:

"E. B. KNIGHT, Adm'r of M. Parker, Dec'd, *vs.* JNO. N. CLARKSON and Others. } In Ch'y.

The plea of Thos. B. Swann, def., to the bill of complaint and to the amended bill of s'd adm'r and to the bill of revivor filed in this cause — 1883.

This def't, by protestation, not confessing or acknowledging all or any of the matters and things in said compl. said bill and amended bill or bill of revivor to be true in such manner and form as the same are therein set forth and alleged, for plea to s'd bills says—

That Jno. D. Young, his codefendant to said original bill, died, as appears in the bill of revivor filed in this cause in 1883, in the year 1872, leaving as his heirs-at-law the persons named in said bill of revivor.

That before this cause was removed to this court in 1866 the cir. c't of Kanawha c'ty made an order of reference, as appears
166 of record, referring the *the* cause for an account, &c.

That this court, after the death of said Young and before the cause was revived as to his heirs, to wit, in 1873, made an order of reference, referring the same to Master Com'r Fontaine for an account.

That s'd commissioner took much testimony and various orders recommitting his several reports were made, and that all the proceedings under s'd order of reference and all the reports made by

said com'r and all the orders of reference, all the decrees and decretal orders made in this cause after the s'd order of reference of 1873 were made, had, done, and performed before any revival was asked or had bringing s'd heirs of s'd Young in as parties to the cause; and thereupon this defendant pleads that as no revival was had against s'd heirs, therefore all s'd orders, decrees, and testimony were inadmissible as to s'd heirs and can in no way effect them, and no decree can be had against the lot of land held and inherited by them from s'd Young for and on account of any matters arising under said proceedings; and, further, that s'd heirs have been in possession of s'd lot under title derived from said Young for more than 10 years since his death, before any bill of revivor was filed in this cause against them, and therefore this defendant pleads the statute of limitations; all of which s'd matters and things this defendant is ready and willing to aver, maintain, and prove, as this court shall direct. Therefore he prays, &c.

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2. And for further plea defendant says that George Jeffries, also party defendant to s'd original bill, died some years ago—how long defendant does not know, but he thinks, perhaps, 8 or 10 years ago, or it may be more—leaving as his heirs Thomas, Julia, John, Mary, and Allice Jeffries, during the taking of the account under s'd order of reference of 1873 and the proceedings had subsequent to s'd order under same; that said heirs are now in life and have never been made parties either to s'd original or to s'd amended bill or to said bill of revivor; all of which this defendant is ready and willing to aver, maintain, and prove as this court shall direct.

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He therefore prays, &c.

I certify that in my opinion the above pleas are well founded in law.

JNO. S. SWANN,
Sol. for T. B. Swann.

I, T. B. Swann, affirm that the above pleas and each of them, to the best of my knowledge, are true and not intended for the purpose of delay.

T. B. SWANN.

Taken, sworn to, & subscribed before me this — day of ——, 1885.

—— ——."

The answer of T. B. Swann to amended bill, referred to in the decree last aforesaid, is in the words and figures following, to wit:

"*Amended Bill.*

PARKER'S ADM'R *v.* CLARKSON *et al.*

For answer to said amended bill filed in this cause May term, 1885, resp., T. B. Swann, says—

169

That he adopts as answer to this bill his answer to the original bill filed in this cause.

That at the time he purchased of J. N. Clarkson the lot set out in the amended bill from J. N. Clarkson of date 21 J'n'y, '58, it was distinctly understood & agreed by and between them and Jas. Clarkson, as part of the contract of purchase, that s'd lot set out in said deed and release therewith should be made secure to said Swann by Jas. Clarkson's trust therein, if necessary, to protect Swann's title thereto from other liens thereon. With that view the release annexed to said deed was intended by all parties to this arrangement as an assignment of so much of Jas. Clarkson's trust set out in the deed from J. N. Clarkson to J. J. Williams as w'd protect Swann's title to s'd lot. The release was intended to be in favor of this resp., and no one else. If the said release in terms does not carry out that agreement it falls short of the agreement & intention of all parties thereto. It was intended to protect Swann from intermediate judgment liens against J. N. Clarkson. It was not intended to advance the
170 claims of such other judgment creditors of J. N. Clarkson. By this release it was intended to throw the strength of Jas. Clarkson's trust deed over Swann's title so derived to this lot, so far as held and owned by Jas. Clarkson, to protect Swann's title to same lot against all other judgment liens thereon. Said release was intended to be an assignment as well from Jas. Clarkson to T. B. Swann of so much of his trust as w'd secure Swann's title to said lot, & hence the peculiar language of s'd release. James Clarkson consented to the purchase in this way, and he had the right to assign in this way. It was competent for Jas. Clarkson to file his prior lien in favor of resp. without creating for intermediate lienors a priority they did not have and which he did not intend to give to them.

The object of the release was to save to T. B. Swann the title to said lot, free from any and all judgments against J. N. Clarkson after 14 Aug., '52. The trust was intended to follow the release,
171 quitclaim, or assignment, to give it validity & priority. It was intended by all parties to foreclose the mortgage on this lot as effectually as if sold under the trust of Jas. Clarkson and purchased by resp. The court is asked to perfect the intent of all the said parties in this matter; that all the debts set out in said trust of 14 Aug., 1852, have been paid except Jas. Clarkson's. Resp. is advised that the demands of the claimants in the amended bill are stale as to this resp., who took and has by himself & those claiming under resp. held, without adverse possession of said lot, conveyed to him by J. N. Clarkson & wife 21 J'n'y, '58, from that day to this, paying all taxes on it.

Resp. relies upon his answer to the original bill filed in this cause as part of this answer. Resp. & his alieners *was* in possession of the lot under the deed and release, and until his title was attacked in this suit by the bill of revivor; did not think necessary to set up his title to said lot because it was not attacked. As soon as
172 his title was attacked he filed his answer in this cause; therefore, &c.

T. B. SWANN.

Taken, sworn to, and subscribed before me this 28th Nov., 1885.
JASPER Y. MOORE,
Clerk D. C. U. S., D. W. V.

J. S. SWANN, *Sol.*"

The answer of J. M. Young and M. W. Young, referred to in the decree last aforesaid, is in the words and figures following, to wit:

"M. PARKER'S ADM'R
vs.
JNO. N. CLARKSON *et al.* } In Chancery.

The joint answer of the defendants, J. M. Young and M. W. Young.

Saving, &c., — say that they have read the answer of Jno. N. Clarkson, ag't for Rob't W. Clarkson, ex'or of James Clarkson, deceased, and they here adopt the same and make it their own, so far as it is applicable to their case.

These defendants rely upon the statute of limitations as
173 a perfect and complete defense to the claim set up by the plaintiff, so far as it seeks to subject the lot of land conveyed by E. Mays to J. D. Young, from whom these defendants claim title by deed bearing date Jan'y 31st, 1860. These defendants say that they and those under whom they claim have been in peaceable, quiet, and undisturbed possession of said property since the date of said deed of E. Mays to J. D. Young, and have kept the taxes paid on said property during all said years, and that the title under which these defendants claim said land has never been questioned or assailed until the filing of plaintiff's amended bill at the last or a recent term of this court, more than 25 years after the date of the said deed from Mays to J. D. Young, and that it would now be unjust and inequitable to subject the said property to sale to satisfy any of the debts set up in this cause. Defendants therefore pray that they may be hence dismissed with costs, &c.

J. M. YOUNG,
M. W. YOUNG,

174 By KNIGHT & COUCH, *Sol's.*

J. M. Young, being duly sworn, says that the allegations in the foregoing answer are true so far — stated on his own information & so far as stated on information he believes them to be true, and that the said answer is not interposed for delay.

Given under my hand this 28th day of November, 1885.
JASPER Y. MOORE,
Clerk D. C. U. S., D. W. V."

The petition of the heirs of J. D. Young, and referred to in the decree last aforesaid, is in the words and figures following, to wit:

"MILTON PARKER'S ADM'R
vs.
J. N. CLARKSON *et al.* } In Chancery.

To the Honorable J. J. Jackson, judge of the district court of the United States for the district of West Virginia, sitting at Charleston:

175 The petition of M. W. Young, J. M. Young, and America Dix, formerly Young, would respectfully show unto your honor that their father, J. D. Young, departed this life intestate in the year 1872, seized and possessed in fee of all that certain lot of land on Virginia street, in the city of Charleston, West Virginia which was conveyed, as set out in the papers in the above cause, by the defendant, John N. Clarkson, to T. B. Swann, conveyed to Ezekiel May, by deed dated and recorded in Kanawha county court clerk's office January 4th, 1860, and afterwards conveyed by said May to the said Young by deed bearing date and recorded in said clerk's office on June 10th, 1864.

That the said Young left surviving him five children, his sole heirs-at-law—viz., your petitioners and L. N. Young and Hattie Slack, formerly Young.

That by deed bearing date —— —, 187–, and recorded in said clerk's office, the said Hattie Slack conveyed all her interest in said property to your petitioner, M. W. Young.

176 That by deed bearing date March 30th, 1874, of record in said clerk's office, the said lot was partitioned so as to assign to your petitioner, America Dix, her share and portion of the same, which ever since said date your petitioner, America Dix, has held as her own in severalty.

That by deed bearing date August 10th, 1874, and of record in said clerk's office, the said L. N. Young conveyed his interest in the said real estate to your petitioner, M. W. Young, so that said real estate has since the dates of the deeds aforesaid been held and owned and possessed, $\frac{3}{6}$ undivided parts thereof, by your petitioner, M. W. Young, $\frac{1}{6}$ undivided part thereof by your petitioner, J. M. Young, and $\frac{1}{6}$ part thereof in severalty by your petitioner, America Dix.

That in the year 188– your petitioners, J. M. Young and M. W. Young, put upon the $\frac{1}{3}$ of said real estate owned by them as aforesaid a large and commodious livery stable, encased in iron and covered with an iron roof, the actual cost of which was more

177 than $1,200; that your said petitioners have also put another stable upon their said portion of said real estate and other valuable and permanent improvements, the actual cost of which was about $300; that all of said improvements were permanent in character, and are still upon said property.

That your petitioner, America Dix, after the assignment to her of her portion of said real estate as aforesaid, has built thereon a stable and other improvements permanent in their nature and still upon said real estate, the cost of which was more than $150, and she further shows that the said J. D. Young in his lifetime, under whom she claims as aforesaid, believing his title to be good to said real

estate, built a dwelling-house of the value of $500 on that portion of said real estate owned by s'd Dix, all of which improvements are still on s'd land. Your petitioners further show that at the time said improvements were put upon said real estate that your petitioners were holding the same as aforesaid under the title as
178 aforesaid, which was by your petitioner believed to be good. Your petitioners therefore pray that they may be allowed for the permanent improvements put by them as aforesaid upon said real estate, and that such other, further, and general relief may be granted them as is proper under the circumstances of their case.

And as in duty bound they will ever pray, &c.

M. W. YOUNG,
J. M. YOUNG,
AMERICA DIX,
By Counsel.

KNIGHT & COUCH, *Sol's.*"

The plea and answer of Jno. N. Clarkson, referred to in the decree last aforesaid, is in the words and figures following, to wit:

"E. B. KNIGHT, Adm'r of M. Parker, Dec'd,
vs.
JNO. N. CLARKSON and Others. } In Ch'y.

179 The plea of Jno. N. Clarkson and of R. W. Clarkson, as executor of James Clarkson, dec. def's, to the amended bill of E. B. Knight, adm'r of M. Parker, dec'd, compl't.

These defendants, by protestations, not confessing or acknowledging all or any of the matters and things in s'd compl. amended bill contained to be true in such sort, manner, and form as the same are therein set forth and alleged, for plea to s'd amended bill say that on the 14 day of August, 1852, Jno. N. Clarkson executed to Jno. J. Williams a trust deed to secure to James Clarkson a debt due him by note, dated 6 Jan'y, 1848, for $7,000.00, payable five years after date, with interest from date, and s'd deed was recorded on the same day in the clerk's office of Kanawha county; that many other debts were secured by same deed; the property conveyed is the same referred to in the amended bill; that in Dec'r, 1865, M. Parker filed his original bill in this cause in the cir. c't of Kan. c'ty, and made this deed a part of the bill. The said bill alleges
180 that Jno. N. Clarkson by s'd deed conveyed the real and personal estate named therein to secure sundry debts—among them this $7,000.00, and also two debts due s'd Parker, respectively, $1,486.76 and $400.00. The bill further alleges that the s'd trustee had removed from this State, and that a considerable portion of the debts secured had been paid, but makes no specification, and that by removal of the trustee the trust could not be executed. The bill further alleges that after executing s'd deed Jno. N. Clarkson conveyed to T. B. Swann 1¾ acres of land, a lot in Charleston therein described; that s'd Swann afterwards conveyed same to Mays and Mays to Young, &c. These respective deeds are filed as part of the

bill. The deed from Clarkson to Swann is dated the 21 July, 1858, and attached thereto and part thereof is a release by the beneficiary, James Clarkson, in favor of s'd Swann of all trusts or liens on s'd house and lot 'mentioned in the annexed deed, but this re-
181 lease is not intended to release our lien upon any of the other property of Jno. N. Clarkson in any trust deed recorded in Kanawha county clerk's office. The bill prays the court to appoint another trustee in the place of Jno. J. Williams, and for an account to show what payments have been made on the debts secured by said trust deed and what liens are on the lands named in the deed of trust or owned by said J. N. Clarkson, and for a sale of the lands named in the deed and for general relief, &c., &c.

That by this bill said trust is admitted and treated as a valid and subsisting lien and said debt of $7,000.00 a valid and subsisting debt, and said release is filed with the bill and neither disputed or called in question.

That said defendant, R. W. Clarkson, on the 8th June, 1866, answered said bill, as shown by the record, and set out in said answer that said debt of $7,000.00 was still due and unpaid, with the interest, and concur-ed in the prayer of the bill asking for the appointment of a trustee and a sale of the property, &c.; that
182 in April, 1866, before the cause was removed to this court, the cir. c't of Kanawha county refer-ed the cause to a master commissioner to report, as prayed for in the bill, what debts named in said trust deed were due or paid and what liens, trust or otherwise, were on the lands named in the same or on any other real estate of said J. N. Clarkson, &c., &c.; that a report was made under this order, but was held vacated because made by a gentleman not a com'r in chancery.

That after the cause was removed to this court, and on the 24 Dec'r, 1873, by a decretal order then entered, Com'r Fontaine, a master com'r of this court, was ordered, among other things, to execute said order of said Kan. cir. c't made in 1866 and report all liens on the lands of said Jno. N. Clarkson, whether trust or otherwise, as well as what debts named in said trust deed were paid or still due, and said com'r, after hearing all the evidence, reported said trust lien in favor of said James Clarkson good and valid and
183 subsisting, as also said release, and no exception has been ever taken to said report.

That again on the 7th Nov., 1877, the cause was recommitted to said com'r for the same and other purposes, and in Oct'r, 1878, said com'r again reported s'd trust in favor of James Clarkson to secure said $7,000.00 good and valid, and also said release, and no exception was taken, and the report in favor of said trust yet stands confirmed, as also the report in favor of said release, for neither has been excepted to or called in question by any *place* or evidence. It thus appears from the record that over 32 years have elapsed since said trust deed was executed and recorded; that about 20 years have elapsed since the original bill in this cause was filed; about 27 years since said release was executed and recorded in favor of said Swann; about 19 years since R. W. Clarkson, ex'or of James Clarkson, filed

his said answer; about 19 years since the first order of reference made by Kan. cir. c't to a com'r to ascertain and report the liens, &c., under the trust; that over 12 years have elapsed since
184 by an order of this court this cause was referred to Com'r Fontaine for the above-named purposes, and about 7 years since said com'r reported in favor of said $7,000.00 and said release, and in all this time—more than 32 years since the recording of the trust; more than 27 years since the recording of said release; more than 20 years since the original bill was filed; 19 years since the first reference of the cause to a com'r of the court; neither M—. Parker, who died some years ago, nor his adm'r nor any party to this suit, has ever, until the May term of this court, 1885, made any claim by any form of plea, exception to com'r reports, evidence or otherwise calling in question the validity of this $7,000.00 debt, or the trust deed securing it, or in any manner adverse to said trust lien or to said release or to the title of said Swann or those claiming under him.

These defendants therefore plead—

1. That the cause of action set out in said amended bill is stale and not to be heard on account of *lutches*.

185 2. That the cause of action set out in said amended bill occurred more than 10 years before the same was filed.

3. That the cause of action set out in said amended bill occurred more than 20 years before the same was filed.

4. That the cause of action set out in said amended bill, if any existed, has been known to the plaintiff from the record and from the deed filed with his original bill for 27 years before this amended bill was filed.

5. Because no reason is shown or could be shown in said amended bill for this laches and no cause why the matters therein set out were not sooner pleaded; and these defendants plead the several matters aforesaid in bar to so much of the plaintiff's said demand as aforesaid, and prays the judgment of this hon'l- court thereon.

And these defendants, for answer to said amended bill of complaint filed in this cause at spring term 1883, reaffirms and relies upon all the matters set up in the answer of R. W. Clarkson, ex'or of James Clarkson, to plaintiff's original bill filed in this
186 cause, that the debt, $7,000.00, with interest, due from J. N. Clarkson, set out in the trust of J. N. Clarkson to J. J. Williams, trustee, filed in this cause with said bill, is unpaid, and respondants asks that all the lands set out in said trust, which were afterwards conveyed to George Jeffries, be sold to pay the said trust debt.

That the release to T. B. Swann, executed by James Clarkson as part of deed from J. N. Clarkson and wife to said Swann, was intended to perfect the title of said Swann to said lot so conveyed to him by J. N. Clarkson and wife, and if it did not have that effect respondants asks that said lot, 1¾ acres, be sold also for the trust debt due to James Clarkson from J. N. Clarkson. It was not the intention of said release that it should operate as a release generally to benefit the judgment creditors of J. N. Clarkson, but, on the con-

trary, only to benefit and protect Swann's title to said lot against all such judgments and to throw over said title the power of said trust to James Clarkson.

187 That said release expressly reserved the lien of James Clarkson on all the land named in said trust except said lot so released to said Swann. Res. will be permitted to say that said original bill recognizes and does not dispute the lien of James Clarkson of $7,000.00 as good and valid, and prays to have it and the other debts paid by a sale of the property; that the deed to said Swann to which said release was attached and the release itself was before the plaintiff, M. Parker, when the original bill was drawn up and filed; that said release was not then assailed or called in question nor could be; that said James Clarkson had a lien paramount—a right to make the release, and thereby prejudice no creditor; that said Parker in his bill claimed under said trust and asked to have it enforced, and the debts of said Parker have been satisfied under a decree made in this cause.

That he sets up in his amended bill no reason or excuse—no discovery of new facts—for his latches and delay; and now after the lapse of a generation from the execution of the trust and oe

188 27 years from the date of said release, 20 years after filing his bill, his adm'r comes in for the first time with an amended bill to demand of this court to hear him in his attempt to overthrow the allegations and admissions of his original bill 20 years after filing it; to investigate and have construed under new allegations and charges a transaction 27 years old, which was before him when the original bill was filed, and which for its true explanation, if any were needed, might require witnesses presumably dead after the lapse of a generation, and respondant must be allowed to say this would be against that public policy of repose established by all courts everywhere, which will not give countenance to litigation for the first time solicited after the lapse of so great length of time, when it can hardly be supposed a fair and full explanation of the transaction, if any were needed, cannot now be had by evidence

189 *aliunde*. Having sanctioned and admitted the validity of this $7,000.00 due James Clarkson and the trust deed securing it for 33 years, and the release made in favor of T. B. Swann, and the deeds made by him conveying this property to sundry alieners and their respective undisturbed possession thereunder for some 27 years, this respondant is advised a court of chancery will not now give its assistance or countenance to any attempt by any form of pleading to disturb either.

Res. relies upon his petition filed in this cause at the May term and asks the court that the claims of James Clarkson aforesaid may not be prejudiced because of the neglect of counsel. Respondant, R. W. Clarkson, ex'or as aforesaid, has done nothing since the filing his answers to weaken or defeat the trust claim of said $7,000.00 due said James Clarkson. The claim has been again and again reported valid by the master, and respondant asks that the master be required to report specifically the am't thereof, for it is no fault of his that this debt has not been paid.

190 The heirs-at-law of George Jeffries, dec'd, are Thomas Jeffries and George Jeffries, his sons, and Alice Jeffries, Mary, who married —— Gustin, and Julia, who married Henry Rigs, his daughters.

Res. asks that they be made parties defendants to this bill by proper bill of revivor, and that complainant be ordered to revive this suit as against them, to the end that all parties be before the court and all matters involved ended and concluded; all of which matters and things these defendants are ready and willing to aver, maintain, and prove, as the court shall direct, and humbly pray to be hence dismissed with their costs and charges most wrongfully sustained.

JNO. N. CLARKSON,
Agent for Rob't W. Clarkson, Ex'or of James Clarkson, Dec'd.

I hereby certify that the above plea and the answer attached thereto, in my opinion, are well founded in point of law.

T. B. SWANN.

191 STATE OF OHIO, *Gallia County,* } *To wit:*

This day Jno. N. Clarkson, defendant named in the foregoing plea and answer attached thereto, whose signature is above attached to the above plea and answer, made oath before me that the above plea is true in point of fact, and he further made oath, being duly sworn, any says that the facts and allegations therein contained so far as stated on his own knowledge are true, and so far as stated on information he believes them to be true.

JNO. N. CLARKSON,
Ag't for Rob't W. Clarkson, Ex'r James Clarkson, Dec'd.

Taken, sworn to, and subscribed before me this 22nd day of Sept., 1885.

JNO. C. VANDEN,
Notary Public, Gallia County, Ohio."

192 And afterwards, at another day, to wit, at a district court of the United States for the district of West Virginia held at Charleston on Friday, the 8th day of January, A. D. 1886.

This day the defendant, M. W. Young, tendered his petition in the above cause for a rehearing therein, which petition is ordered to be filed.

The petition of M. W. Young, referred to in the foregoing order, is in the words and figures following, to wit:

"M. PARKER'S ADM'R
vs.
J. N. CLARKSON *et al.* } In Chancery.

To the Hon. J. J. Jackson, of the dist. c't of the U. S. for the dist. of W. Va.:

The petition of M. W. Young would respectfully show that he

does not hold or claim the house and lot, except a small portion thereof conveyed to his father, J. D. Young, by E. Mays and
193 ordered to be sold by decree entered in the above cause at this term of this court as heir or devisee of the said J. D. Young, but that he does claim and hold the same to the extent of his interest therein, except a small portion as a purchaser for value.

That on the 20th day of May, 1868, the said J. D. Young, by deed of said date, conveyed to your petitioner a part of said lot fronting 53 feet on Virginia street.

That by deed dated August 25, 1873, Hattie Slack and husband conveyed a certain portion of said lot to your petitioner.

That by deed bearing date August 10th, 1874, Lewis N. Young and wife conveyed a certain other portion of said lot to your petitioner.

That by deed bearing date March 30th, 1874, the widow and four of the five children and heirs-at-law of the said J. D. Young conveyed to America Dix the lower portion of said lot fronting
194 on said Virginia street; that all of said deeds were duly recorded in the clerk's office of Kanawha county court, and certified copies of them are herewith filed and marked, respectively, Exhibits 1, 2, 3, & 4, and are prayed to be read and considered as parts of this petition. Your petitioner is advised and so charges that under the above state of facts *that* the question of the subjection of the interest of your petitioner in said property to any alleged liens thereon cannot be litigated upon a bill of revivor, and can only be litigated upon an original or supplemental bill. Your petitioner therefore prays that your honor will rehear this cause upon the branch thereof in which said decree of sale was entered and allow your petitioner to file a plea appropriate thereto.

Your petitioner also prays that a rehearing may be granted him upon that branch of this cause in which a final decree was rendered on the — day of December, 1885, at the present term of this
195 court, and sets out the following grounds for such rehearing: That he is aggrieved by the courts finding against him upon the pleas of the statute of limitation filed in this cause by your petitioner to complainant's bill of revivor and amended bill; and, &c.

M. W. YOUNG,
By Counsel.

KNIGHT & COUCH.

STATE OF WEST VIRGINIA, } *To wit:*
Kanawha County, }

M. W. Young, whose name is signed to the foregoing petition, being duly sworn, says that the same is true as he verily believes.

M. W. YOUNG.

Subscribed and sworn to — me, in the county aforesaid, this 8th day of January, 1886.

GEO. S. COUCH,
Notary Public, Kan'a County."

And afterwards, at another day, to wit, at a district court
196 of the United States for the district of West Virginia held, as aforesaid, on Thursday, the 6th day of May, A. D. 1886.

This cause came on this day upon the motion of the complainant to dismiss the petition filed by M. W. Young for a rehearing of the decree entered herein on the 12th day of December, 1885; which, being argued by counsel, the court doth adjudge, order, and decree that said petition be disallowed and dismissed, and the same is accordingly done.

I, Jasper Y. Moore, clerk of the district court of the United States for the district of West Virginia, do hereby certify that the foregoing is a true transcript of the record of so much of the cause of Milton Parker's Adm'r against John N. Clarkson & oth's as is re-
197 quired by the appellants in their appeal to the Supreme Court of the United States from the decree entered in the said cause by the said district court on the 12th day of December, 1885.

In testimony whereof I hereunto subscribe my name and affix the seal of my said court, at Charleston, this 26th day of August, A. D. 1886, and of the Independence of the United States of America the 111th.

{Seal District Court United States, District West Virginia, Charleston, West Va.}

JASPER Y. MOORE,
C'lk D. C. U. S., D. W. Va.

Endorsed on cover: West Virginia D. C. U. S. No. 342. L. N. Young, M. W. Young, J. M. Young, H. Slack, and A. Dix, heirs-at-law of J. D. Young, deceased, J. N. Clarkson and Thomas B. Swann, appellants, *vs.* E. B. Knight, administrator of Milton Parker, deceased. Filed September 14, 1886.

	Original.	Print.
Writ of certiorari	1	1
Order adjourning court to Jan. 4, 1886	4	2
Order filing petition of M. W. Young for rehearing	4	2
Petition of M. W. Young for rehearing	4	2
Order denying petition of M. W. Young for rehearing	7	3
Order adjourning court to June 10, 1886	8	4
Order filing petition of M. W. Young for bill of review	8	4
Petition of M. W. Young for bill of review	9	4
Extracts from report of Commissioner Fontaine, Sept. 26, 1881	22	8
Exceptions endorsed on report of Commissioner Fontaine	46	19
Extracts from report of Commissioner Fontaine, Oct. 30, 1876	49	20
Extract from report of Alex'r T. Laidley	52	21
Exceptions endorsed on Commissioner Fontaine's 4th report	52	22
Clerk's certificate as to judgment in favor of J. H. Brown	54	22
Clerk's certificate and return to certiorari	55	23

1 THE UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the judge of the district court of the United States for the district of West Virginia, Greeting:

Whereas in a certain suit in said district court between E. B. Knight, administrator of Milton Parker, deceased, complainant, and L. N. Young, M. W. Young, J. M. Young, H. Slack, and A. Dix, heirs-at-law of J. D. Young, deceased, and J. N. Clarkson, Thomas B. Swann *et al.*, defendants, which suit was removed to the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit: "That a part of the record in this cause, the evidence, orders, commissioner's reports, judgment, petitions, &c., have been by mistake omitted from the certified record sent up to the Court under the certificate of the clerk, to wit:

1. Order adjourning the court to 4th of July, 1886, dated December 14, 1885.
2. Order filing petition of the defendant Youngs, July 8, 1886.
3. Order dismissing the said petition, May, 1886.
4. Order adjourning the term of the court to June 10th, 1886.
5. Order filing petition of M. W. Young for bill of review, July, 28, 1886.
6. Copy of the petition.
7. Extract from Commissioner Fountain's 5th and last report, p. 1 to 6, inclusive, down to said period, including the words said period.

2 8. On p. 26, this report, copy of what is reported about the judgment of Babbet, Good & Co.

9. P. 23, this report; all that is reported about the judgment of Babbet, Good & Co. *vs.* J. N. Clarkston for $654 10
P. 45. All that is reported as to judgment of Putney and Norton 633 97
P. 46. Same as to judgment of R. E. Putney & Co.. 3,075 25
P. 25. Same as to judgment of F. Thompson 2,211 62
P. 38. Same as to judgment of F. Thompson 2,224 42
P. 40. Same as to judgment of J. H. Brown 821 91
P. 40. Same. 716 54
P. 42. Same. 827 82
P. 43. Same. 979 79
P. 54. Same. 3,982 44
P. 47. Same as to judgment of Hedrick for Parks.. 967 18
P. 48. Same as to judgment for M. Parker 1,233 75
P. 49. Same as to judgment, Hussey & Co. 8,080 86
P. 50. Same as to judgment, same 269 33

10. T. B. Swann, exceptions on this report for Hussey & Co.
11. J. H. Ferguson, " " " "

12. That judgment for J. H. Brown, $529.76, set out in the final decree, is omitted from the report.

13. Concluding clause in Mr. A. L. Laidley's report, showing that he was a private gentleman and not a commissioner, &c.

You therefore are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Supreme Court, so that you have the same, together with this writ, before the said Supreme Court forthwith.

3 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 23d day of January, A. D. 1889.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

4 At a district court of the United States for the district of West Virginia, held at Charleston, on Monday, the 14th day of December, A. D. 1885, among the proceedings had was the following, to wit: * * *

Ordered, that this court be adjourned until the 14th day of January, 1886.

And at another day, to wit:

At a district court of the United States for the district of West Virginia, held at Charleston, on Friday, the 8th day of January, 1886, among the proceedings had was the following, to wit:

M. PARKER'S ADM'R
vs.
J. N. CLARKSON *et als.* } In Chancery.

This day the defendant, M. W. Young, tendered his petition in the above cause for a rehearing therein, which petition is ordered to be filed.

The petition referred to in the last foregoing order is in the words and figures following, to wit:

M. PARKER'S ADM'R
vs.
J. N. CLARKSON *et al.* } In Chancery.

5 To the Hon. J. J. Jackson, of the dist. c't of the U. S. for the dist. of W. Va.:

The petition of M. W. Young would respectfully show that he does not hold or claim the house and lot, except a small portion thereof conveyed to his father, J. D. Young, by E. Mays, and ordered to be sold by decree entered in the above cause at this term of this court, as heir or devisee of the said J. D. Young, but that he does claim and hold the same to the extent of his interest therein, except a small portion as a purchaser for value; that on the 20th day of May, 1868, the said J. D. Young, by deed of said date, conveyed to your petitioner a part of said lot fronting 53 feet on Virginia street.

That by deed dated August 25, 1873, Hattie Slack and husband conveyed a certain portion of said lot to your petitioner; that by deed bearing date August 10th, 1874, Lewis N. Young and wife conveyed a certain other portion of said lot to your petitioner; that by deed bearing date March 30th, 1874, the widow and four of the five children and heirs-at-law of the said J. D. Young conveyed to America Dix the lower portion of said lot fronting on said
6 Virginia street; that all of said deeds were duly recorded in the clerk's office of Kanawha county court, and certified copies of them are herewith filed, and marked, respectively, Exhibits 1, 2, 3, & 4, and are prayed to be read and considered as parts of this petition.

Your petitioner is advised and so charges that under the above state of facts that the question of the subjection of the interest of your petitioner in said property to any alleged liens thereon cannot be litigated upon a bill of review and can only be litigated upon an original or supplemental bill.

Your petitioner therefore prays that your honor will rehear this cause upon the branch thereof in which said decree of sale was entered and allow your petitioner to file a plea appropriate thereto.

Your petitioner also prays that a rehearing may be granted him upon that branch of this cause in which a final decree was rendered on the — day of December, 1885, at the present term of this court, and sets out the following ground for such rehearing:
7 That he is aggrieved by the courts finding against him the facts upon the pleas of the statute of limitation filed in this cause by your petitioner to complainant's bill of review and amended bill; and, &c.

M. W. YOUNG, *By Counsel.*

KNIGHT & COUCH.

STATE OF WEST VIRGINIA, *Kanawha County,* } *To wit:*

M. W. Young, whose name is signed to the foregoing petition, being duly sworn, says that the same is true as he verily believes.

M. W. YOUNG.

Subscribed and sworn to me, in the county aforesaid, this 8th day of January, 1886.

GEO. S. COUCH,
Notary Public, Kan'a Co., W. Va.

And at another day, to wit:

At a district court of the United States for the district of West Virginia, held at Charleston, on Thursday, the 6th day of May, 1886.

MILTON PARKER'S ADM'R *vs.* J. N. CLARKSON & Others } In Chancery.

8 This cause came on this day upon the motion of the complainant to dismiss the petition filed by M. W. Young for a

rehearing of the decree entered herein on the 12th day of December, 1885, which being argued by counsel, the court doth adjudge, order, and *and* decree that said petition be disallowed and dismissed, and the same is accordingly done.

And at another day, to wit:

At a district court of the United States for the district of West Virginia, held at Charleston on Saturday, the 22nd day of May, 1886, among the proceedings had was the following, to wit: * * *

Ordered, That this court be adjourned until the 10th day of June, 1886.

And at another day, to wit:

At a district court of the United States for the district of West Virginia, held at Charleston on Wednesday, the 28th day of July, 1886—

PARKER'S ADM'R *vs.* CLARKSON *et als.* } In Chancery.

9 This day M. W. Young tendered his petition in this cause, which is ordered to be filed, and the same is set down for argument.

Which said petition is in the words and figures following, to wit:

"To the Honorable Jno. J. Jackson, judge of the U. S. D. court for the district of West Virginia:

The petition of Milton W. Young respectfully represents that Jno. D. Young — one of the defendants in the suit of M. Parker *vs.* Jno. N. Clarkson and others, now pending in your honor's court, which was revived by order of this court on the 9th February, 1875, in the name of E. B. Knight, adm'r of said Parker, dec'd, on the 2nd April, 1872.

That said Jno. D. Young, before his death, by deed dated May 20, 1868, a copy of which is herewith filed and made part hereof, conveyed to your petitioner a large part of the lot of land in controversy by certain metes and bounds, fronting 53 feet on Virginia street, with a dwelling-house and other houses on it, of which your petitioner has been in possession ever since, claiming and holding
10 adversely to all the world under said deed, which had been conveyed by deed to him by Ezekiel Mays and decreed to be sold by a decree of this court at the fall term, 1885; that on the 25 August, 1873, Hettie Slack, one of the heirs of said J. D. Young, and her husband, Jno. Slack, conveyed to him by deed, also herewith filed, a small portion of said lot; that L. N. Young, another of said heirs, on the 24th Aug., 1874, by deed filed, conveyed to him another small portion of said lot; that on the 20 March, 1874, the widow of said Jno. D. Young and L. N. Young, heir of said J. D. and his wife, J. W. Young, heir of said J. D. and his wife, conveyed, by deed filed, to America Dix the lower portion of said lot, being a small part and residue thereof; that the said suit of Parker *v.* Clarkson and others was instituted in ——, 1865, and the bill filed —— in that year in the circuit court of Kana-

wha county; that during its pending in said court no answer was filed by said Jno. D. Young and no appearance was made by him and no account or evidence was lawfully taken in the cause.

That at the spring term of this court, to wit, on the 22
11 April, 1872, after the death of said J. D. Young, an order was made in this court transferring the said cause to this court, and the same was docketed 26 April, 1872; and petitioner avers as the said J. D. Young was then dead and their had been no suggestion of his death, no bill of revivor or supplemental bill tendered or filed making this petitioner in any way or form known to the law a party to said suit, and neither this petitioner nor the heirs of said J. D. Young could resist said order, they not having been made parties, that said order of transfer and the docketing of the same could not be objected to by him, and was therefore as to him null and void.

Petitioner is further advised that said order of transfer and the docketing thereof was illegal and not warranted by law and gave the court no jurisdiction, because the facts stated in the affidavit and petition of C. G. Hussey & Co. and of John Johns, assignee, &c., did not warranty the transfer of said cause from Kanawha circuit court to this court, as appears on the face of those proceedings, both the affidavits and the petitions and each of them; but
12 had this petitioner been made a party he could and would have objected; that on the 24 Dec., 1873, after the death of said J. D. Young and before any bill of revivor or other proceedings to bring this petitioner as purchaser before the court or to bring the heirs of said J. D. Young before the court to the end that they might be heard and contest the claims prefer-ed against said J. D. Young, this court, by order entered of record, referred this cause to Commissioner Fontaine to take an account, &c., after giving notice to all parties in interest; that an account was for the first time taken under this order, and a report was made by said commissioner on the 27 August, 1877, the same being the first account and report in the cause legally taken or made, and that after the death of said Jno. D. Young, and more than 10 years before any bill of revivor against the heirs of said Young, no bill of revivor or supplement ever having been yet filed to call in question your petitioner's rights as purchaser aforesaid, as petition- here avers.

That on the 7 Nov., 1877, an order was made recommitting said report of said commissioner to retake an account, &c., requir-
13 ing notice to be given to all parties in interest, with leave to each to furnish evidence, &c.; that on the 14th Oct., 1878, a report was filed of the account, &c., taken under said order; that on the 30 Nov., 1878, the said report was recommitted, with the same terms and privileges to retake the account; that in May, 1880, the report of said commissioner was filed, and on July 6, 1881, said report was recommitted on said above terms, with leave to all parties to furnish any new or additional evidence, and commissioner to report on any other matters, &c., after giving notice, &c.

That at the spring term, 1881, said commissioner filed his report as required by said recommittal; that on the 27 May, 1881, an order

was made recommitting the commissioner's 3rd and 4th reports requiring said commissioner to report who made claims before him of judgment liens, who appeared before him, what attorney represented claims, what judgments barred by statute, reserving right to any defendant named in bill to claim benefit of statute of limitation, to take evidence required by any party after notice to all the defendants, &c., &c.

14 That at the fall term, Nov. 23, 1881, a decree was rendered ascertaining the claims set up in the bill, priorities, &c., and directing sale of the Clarkeston farm; that at the March term, 1881, the commissioner's report was recommitted at instance of complainant and defendant's attorney to take any new or additional evidence as to any debt allowed or rejected in his report of 1880, or other matters, &c., after notice, &c.; that a report under said order was filed by said commissioner at the spring term, 1881; that at the same term, 1881, said report was again recommitted, and every matter and thing ordered to be gone over again; that a report under this order was filed by said commissioner, fall term, 1881; that at the fall term, 1881, a decree was made and entered sustaining some exceptions, overruling others, determining the claims set out in the bill and the priorities of liens, &c.

That on the 3rd day of April, 1883, Messrs. Miller & Gallagher, who were counsel on the record for Jno. N. Clarkson, and being the same S. A. Milier under whose advice, as attorney paid by him, this petitioner's father, J. D. Young, bought the land as above

15 stated, he being advised by said Miller that the title was good, tendered a bill of revivor for the first time against the heirs of Jno. D. Young, setting out that said J. D. Young died 1872—said Young died 2nd April, 1872, but not against this petitioner, purchaser aforesaid; and petitioner is informed that his rights as such purchaser could not be litigated or determined under a bill of revivor, as he did not claim as heir, but only under a supplemental bill, and that his rights as purchaser aforesaid have not been and cannot be effected by any proceedings had in this cause heretofore; that T. B. Swann moved, fall, 1884, to strike said bill of revivor from the docket, which motion was overruled, and at fall term, 1884, on motion of said Miller and Gallagher, leave was granted to amend said bill of revivor, which was done, and at spring term, 1885, on motion of said Miller and Gallaher, said bill was amended and filed; that your petitioner, as purchaser as aforesaid, was not made a party in either of these bills of revivor, nor his rights as purchaser

16 called in question, nor could they be; that at the fall term, 1885, the court, among other things, decreed a sale of said lot of land sold to T. B. Swann by J. N. Clarkston, at same time James Clarkston released and assigned to said Swann his equitable interest in same, by Swann to E. Mays, by Mays to said J. D. Young, and as well the portion conveyed to petitioner as aforesaid; that no notice in said decree was taken of the interests acquired by your petitioner by purchase from said J. D. Young in his lifetime or from the other parties herein named for the reasons that the plaintiff had neglected and failed to bring him as such purchaser or the interest so acquired

by him before the court in the manner and mode required by law, and no opportunity had been given him to defend his interests so purchased.

Your petitioner avers that he has been in quiet, undisturbed, and unquestioned possession of the land so purchased from said J. D. Young since the date of the deed, 1868, to this hour and of the other parts thereof since the dates of the deed aforesaid, and no proceedings have been had to call his rights so acquired into controversy.

17 That at the fall term, 1885, the same term at which said decree ordering sale of the said lot was made, your petitioner tendered his petition for a rehearing and prays the same may be made part of this petition, and that same was, on motion of plaintiff, dismissed; and petitioner prays the court to review said order of dismissal and allow the petition thereby dismissed.

Your petitioner avers and charges that Jno. D. Young never answered the original bill; that no account or evidence was lawfully taken or heard during his lifetime; that when this cause was transferred to this court said Young was dead, and that during the whole time of these proceedings, orders of reference, reports, recommittals, &c., &c., after the cause was docketed in this court or while pending in Kanawha circuit court, there was no bill of revivor filed in this cause against said Young's heirs; that they did not and could not appear in the cause, and hence their rights have been adjudicated without giving them an opportunity to be heard; that the first order of reference under which any evidence and the accounts were taken was made by this court on the 24 Dec., 1873, after the death of said J. D. Young.

18 That as to this petitioner and as to the rights so acquired by him in said lot of land there never has been a bill of revivor tendered or filed, and petitioner is advised that even if there had been his rights so acquired could not, under this form of pleading, be questioned, litigated, or adjudicated, but only under and by a supplemental bill set them out, and asking to subject them, &c.; that no such bill has been tendered or filed, and the rights so acquired have never been called in question by any pleading or evidence, order or decree, in the cause, and could not be under any of them.

Your petitioner is advised that the plaintiff in the cause had no right as to him, purchaser as aforesaid, to proceed in the suit without a supplemental bill, and that so far as his rights so acquired by purchase may be effected all that has been done in the cause was *coram no judice* as to same and void, and no title can be made to pass any purchaser of his rights in the premises so acquired if said land is sold under said decree; that it would be sold under very serious clouds and no prudent man would purchase it; and

19 he is further advised that no man can be effected or disturbed in his person or property under any judicial proceeding, either order of reference, evidence, or decree, without notice to him according to the forms of law, and none has been given him; that to leave the matter as it is must necessarily result in other and mul-

tiplicial litigation, when the court now has and should exercise the right to adjudicate petitioner's title, &c., in this suit.

That had he been notified, among other things, he could have moved to remand the cause to the circuit court of Kanawha, but not being notified he has had no power or authority either to make such motion or to defend his rights in any way. He is advised that this court has no jurisdiction in the cause and that this appears on the face of the proceedings; that if the property is sold under the decree aforesaid the sale will be made under cloud of title and involve others and further litigations; that his rights cannot be adjudicated as they now stand in the appellate court, because the plaintiff has failed to bring them before this court, as it was his duty
20 to do; and to the end that petitioner may be placed in a position to defend his rights as above set out and to avoid a multiplicity of suits and to maintain his possessory rights acquired as above stated uninterrupted for these 17 years, he prays that he may be made a party to this cause by apt and proper order; that this honorable court will reconsider his petition, filed at the time when the final decree above named rejected — at this present term in this connection and for general relief; and to that end, if more proper, he prays that this petition may be taken and considered a bill of review & that the court will review the final decree heretofore made in this cause for the sale of the lot of land sold by J. N. Clarkson to T. B. Swann & by him sold to Mays & by him sold to J. D. Young, dec'd.

M. W. YOUNG.

J. S. SWANN,
KNIGHT & COUCH, *Sol's.*"

STATE OF WEST VIRGINIA, }
Kanawha County, } *To wit:*

M. W. Young, whose name is signed to the foregoing petition, being duly sworn, says that the allegations therein contained
21 so far as stated on his own knowledge are true, and that so far as stated on information he believes them to be true.

Given under my hand this — day of July, 1886.

GEO. S. COUCH,
Notary Public, Kana. Co., W. Va.

22 In the District Court of the United States for the District of West Virginia, at Charleston.

MILTON PARKER'S ADMINISTRATOR }
v. } In Chancery.
JOHN N. CLARKSON and Others. }

Office of Peter Fontaine, com. of U. S. court for district of West Va.

CHARLESTON, WEST VA., *Sept. 26th,* 1881.

To the Honorable John J. Jackson, judge of the district court of the United States for the district of West Virginia:

Your undersigned, commissioner, respectfully reports that on the

27th day of May, 1881, a decree was made and entered in said cause by your honor's said court by which it was provided and ordered, among other things—

"That the 3rd and 4th reports of Commissioner Fontaine filed in this cause be recommitted to said commissioner, and that he report in addition thereto an account of the following matter and things:

"1. The date of the first and of every succeeding execu-
23 tion, if any, issued on each of the judgments mentioned in his said reports, the return day of each of said executions, whether or not the same or any of them were returned, and the return made thereon.

"2. If any such judgment is claimed by any person other than the judgment creditor, the name of such claimant, and how he claims, whether by assignment or otherwise.

"3. What claimants of said judgments appeared before the said commissioner or Commissioner A. T. Laidley in person or by attorney and proved their claims, and how; if by attorney, the name of such attorney; who, if any of them, filed petitions or affidavits or both to support their claims either before him or the said Laidley, with the date of such filing; and if any such claimant appeared before him or said Laidley in person or by attorney to present or prove their claims under any of said judgments without filing petitions or affidavits; who did so and when; the name of the attorney, if one appeared, and what proof, if any, was offered to prove said claim by them.

"4. Which of the said judgments, if any, are barred by the statute of limitations, which limitation is to be computed as follows:

24 "First. On a judgment on which no execution issued within one year after the date thereof the limitation is 10 years from and after the date of the judgment, except as hereinafter provided.

"Second. If one or more executions issued on any such judgment within one year and afterwards in a period of ten years after the return day of the next preceding execution the commissioner shall report as to the statute of limitations in two aspects—first, as the same is claimed by the claimants of the judgments, and, second, as claimed by the assignee in bankruptcy of John N. Clarkson; but in computing said period of limitation the commissioner is to exclude therefrom the period from the 17th day of April, 1861, to and including the 1st day of March, 1865, and one-half of the period between the 8th day of July, 1871, and the 21st day of January, 1873.

"Third. The time at which such limitation ceased to run is to be computed by said commissioner as follows: As — the plaintiff, Milton Parker, at the date this suit was commenced; as to such claimants of said judgments or any of them as appeared before either of said commissioners and filed petitions or affidavits in support of their said claims at, the date the same were filed; as to all other claims, on the 24th day of December, 1873, except that the court
25 reserves the right to pass upon the question of limitation; as to all such cases in which the parties appeared before

either of said commissioners in person or by counsel and offered proof of their claims, without petition or affidavit, on the coming in of the commissioner's report. * * *

"And it is further adjudged, ordered, and decreed that said commissioner take any evidence in the form of depositions which any party may offer upon any of the questions of fact growing out of this reference to him, and return the same with his report herein to the next term of this court.

"And in the event executions upon any of the judgments set up in this cause shall have been stayed by injunction, supersedeas, or appeal, such fact shall be reported by the commissioner, and the court reserves its opinion upon the effect such stay shall have upon the plea of the statute of limitation.

"But before proceeding under this decree the said commissioner shall give notice of the time and place at which he will commence the taking of the account herein directed in the 'Kanawha Gazette,'
a newspaper published in the city of Charleston, once in —
26 week for four successive weeks, which notice when so published shall be equivalent to personal service thereof on all the parties to this suit." See decree of May 27, 1881.

In pursuance of the requirements of said decree I gave notice of the time and place of taking this account and evidence relating thereto by publication made in the said "Kanawha Gazette" newspaper, appointing the 30th day of June, 1881, as the time and my said office as the place for beginning the taking of this account. The first publication of said notice in said newspaper was made on June 1, 1881, and it was published therein once in each week for four successive weeks prior to the said 30th day of June, 1881. A copy of the said notice is filed herewith and made a part of this report as Ex. "A."

Before answering in detail the enquiries of said decree of reference I will state the plan on which this report is made and my understanding of some facts of said decree which may bear different constructions.

First. When a claim was directly set up in the bill filed in
27 this cause and it was obviously "alive" when said bill was filed it has not been deemed necessary or expedient to answer the various enquiries as to the issuance of and returns made on the executions thereon and the mode of proof used.

Second. In deciding whether a claim has been barred by the statute of limitations it is considered that a proper appearance to and assertion of the claim in this suit within the period of 10 years from the date of the judgment or the return day of the last execution thereon, as the case may be (supplemented by the two periods fixed by said decree), has the same effect in stopping the running of the statute of limitations as the issuance of an execution within that time.

Third. The supplementary periods fixed by said decree are taken to be from April 17, 1851, to and including March 1, 1865 (equal to 3 years 10 months 12 days), and from July 8, 1871, to April 15, 1872 (equal to 9 months 7 days, and being one-half of the period

from July 8, 1871, to January 21, 1873, the whole of said period being equal to 1 year 6 months 14 days).

Fourth. These periods are not added together, but are considered as separate periods, to be excluded at their respective dates,
28 and the first half of the latter period (viz., from July 8, 1871, to April 15, 1872) is the period used.

Fifth. Where an execution was issued and made returnable at a date falling within one of the said excluded periods it is considered as running from the end of said period.

* * * * * * *

3rd Report, pp. 33, 34.

BABBITT, GOOD & CO. *v.* JOHN N. CLARKSON & *als.*

Amount then reported, $652.56.

The original judgment on this claim was recovered at the August term of 1856 of the county court of said Kanawha county, and the judgment on the forthcoming bond given thereon was rendered at the December term of 1856 of the same court. This judgment is claimed by James M. Laidley as paid by him and possibly assigned to him. (See Ex. "X Y," pp. 81, 82; affidavit of J. M. Laidley of Feb'y 3, 1879, and Ex. "J. M. L." 1 and Ex. "J. M. L." 2.)

The 1st and only execution on said judgment on forthcoming bond was issued on December 19, 1856, returnable to March rules, 1857 (see 3d Rep., pp. 33, 34), and it was returned with the endorsement: "This, together with various other executions, was levied on various negro slaves & other personal property as the prop-
29 erty of the def't, J. N. Clarkson, and a number of said slaves deemed by me to be sufficient was advertised for sale under said levy & the sale enjoined. For a list of said executions & property see return on the execution of J. H. Brown *vs.* D. J. W. Clarkson & others from Kana. c'r. c't, Book 9, page 25, John Slack, S. K. C." (See Ex. "D. C. G.")

At the beginning of the said first excluded period (viz., April 17, 1861) the said execution had been running 4 years 1 month and 17 days from March rules, 1857 (supposing as before stated), and hence had 5 years 10 months and 13 days to run after the end of said excluded period (viz., March 1, 1865). This would take it up to January 14, 1871. The first appearance to assert this claim was made by the said James M. Laidley at some time prior to July 26, 1870, though it does not appear that at that time he gave any deposition or filed any affidavit in support thereof (see paper endorsed "Tables No. 1 and 2," accompanying report, and account of July 26, 1870, and the column headed "Remarks and memo"). The first appearance before me to assert this claim by deposition was made on the 30th day of August, 1876, at which date the said James M. Laidley gave his deposition in support of this judgment (see
30 Ex. "J. M. L." 1). If it be held that the said first appearance before the former commissioner, A. T. Laidley, is a sufficient appearance (and I consider it such under the circumstances of

this case) this claim is not barred by the statute of limitations; but if it be held that the said first appearance is not sufficient this claim is barred by the statute of limitations, according to the rules of computation prescribed by the said decree of reference.

3d Report, pp. 34, 35.

BABBITT, GOOD & CO. *vs.* JOHN N. CLARKSON & *als.*

Amount then reported, $654.10.

The original judgment on this claim was recovered at the fall term of 1856 of the circuit court of said Kanawha county, and the judgment on the forthcoming bond given thereon was rendered at the spring term of 1857 of the same court. The 1st and only execution on the said judgment on forthcoming bond was issued on July 14, 1857, returnable to October rules, 1857, and it was returned with the endorsement: "This, together with various other executions, was levied on various negro slaves & other personal property as the property of the def't, J. N. Clarkson, and a number of said slaves, deemed by me to be sufficient, was advertised for sale
31 under said levy & the sale enjoined. For a list of said executions & property see return on the execution of J. H. Brown *vs.* D. J. W. Clarkson & others, from Kana. cr. c't, Book 9, page 25, John Slack, "S. K. C." (See 3d Rep., pp. 34, 35, and Ex. "D. C. G.")

At the beginning of the said first excluded period (viz., April 17, 1861) the said execution had been running 3 years 6 months and 17 days from October rules, 1857 (supposing as before stated), and hence it had 6 years 5 months and 13 days to run after the end of said excluded period (viz., March 1, 1865). This would take it up to August 14, 1871.

The remarks made at page 22, *ante*, as to the appearance of James M. Laidley before the former commissioner, A. T. Laidley, and before me, apply also to this claim, except that in this case the said J. M. Laidley appeared as attorney for the plaintiff. If it be held that the said first appearance before Commissioner Laidley is a sufficient appearance (and I consider it such under the circumstances of this case), this claim is not barred by the statute of limitations; but if it be held that the said first appearance is not sufficient, this claim is barred by the statute of limitations, according to the rules of computation prescribed by the said decree of reference.

* * * * * * *

32 *3d Report, p.* 36.

FRANCIS THOMPSON *v.* JOHN N. CLARKSON & *als.*

Amount then reported, $2,211.62.

The original judgment on this claim was recovered at the November term of 1856 of the county court of said Kanawha county, and the judgment on the forthcoming bond given thereon was rendered at the March term of 1857 of the same court. The 1st and only execution on the said judgment on forthcoming bond was issued on

March 18, 1857, returnable to June rules, 1857, and it was returned with the endorsement: "This, together with various other executions, was levied on sundry negro slaves & other personal property of the def't, J. N. Clarkson, and a number of said slaves deemed by me sufficient was advertised for sale under said levy and the sale enjoined; for a list of which executions & property see return enclosed on the execution of J. H. Brown *vs.* D. J. W. Clarkson & others, from Kana. c'ty c't, Book 9, page 25, John Slack, S. K. C." (See 3d Rep., p. 36, and Ex. "D. C. G.")

At the beginning of the said first excluded period (viz., April 17, 1861) the said execution had been running 3 years 10 months and 17 days from June rules, 1857 (supposing as before stated),
33 and hence it had 6 years 1 month and 13 days to run after the end of said excluded period (viz., March 1, 1865). This would take it up to April 14, 1871. The said former commissioner, Laidley, has stated in a paper which is filed in this cause that the executor of Francis Thompson appeared before him previous to the filing of his said report (of February 18, 1870). (See Ex. "A. T. L." 2.)

If it be held that this was a sufficient appearance (and I consider it such), this claim is not barred by the statute of limitations.

* * * * * * *

3d Report, pp. 45, 46.

FRANCIS THOMPSON *v.* JOHN N. CLARKSON & *als.*

Amount then reported, $2,224.42.

The original judgment on this claim was recovered at the February term of 1857 of the county court of said Kanawka county, and the judgment on the forthcoming bond given thereon was rendered at the July term of 1857 of the same court.

The 1st and only execution on the said judgment on forthcoming bond was issued on July 27, 1857, returnable to October rules, 1857, and it was returned with the endorsement: "This, together
34 with various other executions, was levied on sundry negro slaves & other personal property of the def't, J. N. Clarkson, and a number of said slaves deemed by me sufficient was advertised for sale under said levy and the sale enjoined; for a list of which executions & property see return enclosed on the execution of J. H. Brown *vs.* D. J. W. Clarkson & others, from Kana. c'ty c't, Book 9, page 25, John Slack, S. K. C." (See Ex. "D. C. G.")

At the beginning of the said first excluded period (viz., April 17, 1861) the said execution had been running 3 years 6 months and 17 days from October rules, 1857 (supposing as before stated), and hence it had 6 years 5 months and 13 days to run after the end of said excluded period (viz., March 1, 1865). This would take it up to August 14, 1871. The said former commissioner, Laidley, has stated in a paper, which is filed in this cause, that the executor of Francis Thompson appeared before him previous to the filing of his said report (of February 18, 1870). (See Ex. "A. T. L." 2.)

If it be held that this was a sufficient appearance (and I consider it such), this claim is not barred by the statute of limitations.

* * * * * * *

35 *3d Report, pp.* 47, 48.

JAMES H. BROWN *v.* JOHN N. CLARKSON & *als.*

Amount then reported, $821.91.

The original judgment on this claim was recovered at the February term of 1857 of the county court of said Kanawha county, and the judgment on the forthcoming bond given thereon was rendered at the July term of 1857 of the same court. The 1st execution on said judgment on forthcoming bond was issued on July —, 1857, returnable to October rules, 1857, and the 2d and last execution thereon was issued on June 30, 1858, returnable to September rules, 1858. (See 3d Rep., p. 47.)

At the beginning of the said first excluded period (viz., April 17, 1861) the said 2d and last execution had been running 2 years 7 months and 17 days from September rules, 1858 (supposing as before stated), and hence it had 7 years 4 months and 13 days to run after the end of said excluded period (viz., March 1, 1865). This would take it up to July 14, 1872. The remarks at page —, *ante*, as to the appearance of the claimant Brown apply also to this judgment. According to the rules of computation prescribed by the said decree of reference, this claim is not barred by the statute of limitations.

36 *3d Report, pp.* 48, 49.

JAMES H. BROWN *v.* JOHN N. CLARKSON & *als.*

Amount then reported, $716.57.

The original judgment on this claim was recorded at the February term of 1857 of the county court of said Kanawha county, and the judgment on the forthcoming bond given thereon was rendered at the July term of 1857 of the same court. The 1st and only execution on said judgment on forthcoming bond was issued on July 27, 1857, returnable to October rules, 1857. (See 3d Rep., p. 48.)

At the beginning of the said first excluded period (viz., April 17, 1861) the said execution had been running 3 years 6 months and 17 days from October rules, 1857 (supposing as before stated), and hence it had 6 years 5 months and 13 days to run after the end of said excluded period (viz., March 1, 1865). This would take it up to August 14, 1871. The remarks at page —, *ante*, as to the appearance of the claimant Brown, apply also to this judgment. According to the rules of computing prescribed by the said decree of reference, this claim is not barred by the statute of limitations.

37 *3d Report, pp.* 49, 50.

JAMES H. BROWN *v.* JOHN N. CLARKSON & *als.*

Amount then reported, $827.82.

The original judgment on this claim was recovered at the February term of 1857 of the county court of said Kanawha county, and the judgment on the forthcoming bond given thereon was rendered at the July term of 1857 of the same court. The 1st execution on said judgment on forthcoming bond was issued on July —, 1857, returnable to October rules, 1857, and the 2d and last execution thereon was issued on June 30, 1858, returnable to September rules, 1858. (See 3d Rep., p. —.)

At the beginning of the said first excluded period (viz., April 17, 1861) the said 2d and last execution had been running 2 years 7 months and 17 days from September rules, 1858 (supposing as before stated), and hence had 7 years 4 months and 13 days to run after the end of said excluded period (viz., March 1, 1865). This would take it up to July 14, 1872. The remarks at page —, *ante*, as to the appearance of the claimant Brown apply also to this judgment. According to the rules of computation prescribed by the said decree of reference, this claim is not barred by the statute of limitations.

38 *3d Report, pp.* 50, 51.

JAMES H. BROWN *v.* JOHN N. CLARKSON & *als.*

Amount then reported, $979.79.

The original judgment on this claim was recovered at the February term of 1857 of the county court of said Kanawha county, and the judgment on the forthcoming bond given thereon was rendered at the July term of 1857 of the same court. The 1st execution on said judgment on forthcoming bond was issued on July —, 1857, returnable to October rules, 1857, and the last execution thereon was issued on June 29, 1859, returnable to September rules, 1859.

At the beginning of the said first excluded period (viz., April 17, 1861) the said last execution had been running 1 year 7 months and 17 days from September rules, 1859 (supposing as before stated), and hence it had 8 years 4 months and 13 days to run after the end of said excluded period (viz., March 1, 1865). This would take it up to July 14, 1873.

The remarks at page —, *ante*, as to the appearance of the claimant Brown apply also to this judgment. According to the rules of computation prescribed by the said decree of reference, this claim is not barred by the statute of limitations.

* * * * * * *

39 *3d Report, p.* 52.

PUTNEY & NORTON *v.* JOHN N. CLARKSON & *als.*

Amount then reported, $633.97.

The original judgment on this claim was recorded at the fall term

of 1856 of the circuit court of said Kanawha county, and the judgment on the forthcoming bond given thereon was rendered at the spring term of 1857 of the same court. The 1st and only execution on said judgment on forthcoming bond was issued on July 14, 1857, returnable to October rules, 1857, was receipted for by John Slack 25th July, 1857, and returned endorsed: "This, together with various other executions, was levied on sundry negro slaves & other personal property of the def't, John N. Clarkson, and a number of said slaves, deemed by me sufficient, was advertised for sale under said levy, and the sale enjoined; for a list of which property and executions see the return endorsed on the execution of J. H. Brown *vs.* D. J. W. Clarkson & *als.* from Kana. c'ty c't, Book 9, page 25, John Slack, S. K. C." (See Ex. "M N.")

At the beginning of the said first excluded period (viz., April 17, 1861) the said execution had been running 3 years 6 months and 17 days from October rules, 1857 (supposing as before stated), and
40 hence it had 6 years 5 months and 13 days to run after the end of said excluded period (viz., March 1, 1865). This would take it up to August 14, 1871.

C. Hedrick, attorney, states in his affidavit filed in this cause that he was employed to present and file this judgment before said Commissioner Laidley, and that he did do so and asked said Commissioner Laidley to report it previous to the date of the filing of his said report of February 18, 1870. (See Ex. "C. H.")

If this appearance be held sufficient (and I consider it such) this claim is not barred by the statute of limitations, according to the rules of computation prescribed by the said decree of reference.

3rd Report, p. 53.

R. E. PUTNEY, JR., & Co. for, &c., *v.* JOHN N. CLARKSON & *al.*

Amount then reported, $3,075.20.

The original judgment on this claim was recovered at the fall term of 1856 of the circuit court of said Kanawha county, and the judgment on the forthcoming bond given thereon was rendered at the spring term of 1857 of the same court.

The 1st and only execution on said judgment on forthcoming bond was issued on July 14, 1857, returnable to October rules,
41 1857, and it was returned endorsed (with the same return made on the preceding judgment of Putney & Norton—9, 2).

The remarks made at page —, *ante*, as to the appearance of the attorney, C. Hedrick, apply also to this judgment, and also the computation showing the time to which the execution runs.

If this appearance be held sufficient (and I consider it such) this claim is not barred by the statute of limitations, according to the rules of computation prescribed by the said decree of reference.

3d Report, pp. 53, 54.

HEDRICK for M. PARKER *v.* JOHN N. CLARKSON & *al.*

Amount then reported, $967.18.

This judgment was set up in the said bill filed in this cause. (See Record, pp. 9–43.)

The original judgment on this claim was recovered at the spring term of 1857 of the circuit court of said Kanawha county, and the judgment on the forthcoming bond given thereon was rendered at the fall term of 1857 of the same court. (See 3d Rep., p. —.)

In view of these facts it is not deemed necessary to answer in detail the enquiries of said decree of reference as to this claim,
42 for it appears that the question of the bar of the statute of limitations cannot arise in this case.

* * * * * * *

3d Report, pp. 55, 56.

MILTON PARKER *v.* JOHN N. CLARKSON & *al.*

Amount then reported, $1,233.75.

This judgment was set up in the said bill filed in this cause. (See Record, pp. 9–43.) The original judgment on this claim was recovered at the spring term of 1857 of the circuit court of said Kanawha county, and the judgment on the forthcoming bond given thereon was rendered at the fall term of 1857 of the same court. (See 3d Rep., p. —.) In view of these facts it is not deemed necessary to answer in detail the enquiries of said decree of reference as to this claim, for it appears that the question of the bar of the statute of limitations cannot arise in this case.

3d Report, pp. 56, 57.

C. G. HUSSEY & CO. *v.* JOHN N. CLARKSON & *als.*

Amount then reported, $8,080.36.

The original judgment on this claim was recovered at the spring term of 1857 of the circuit court of said Kanawha county,
43 and the judgment on the forthcoming bond given thereon was rendered at the fall term of 1857 of the same court.

The 1st execution on said judgment on forthcoming bond was issued on December 5, 1857, returnable to February rules, 1858; is endorsed, "Rec'd this ex'on 8th Dec., 1857, A. Moore, D. S.," and was returned endorsed "No property found. Jno. Slack, S. K. C."

The 2d execution thereon was issued on June 1, 1859, returnable to August rules, 1859; is endorsed, "Rec'd this ex'on 17th June, 1859, E. S. Arnold, S. K. C.," and was returned endorsed, "No property found. E. S. Arnold, S. K. C."

The 3rd execution thereon was issued on May 15, 1867, returnable to August rules, 1867; is endorsed, "Rec'd this ex'on 28th May,

1867, John W. Sentz, S. K. C.," and was returned endorsed, " No property found. John W. Sentz, S. K. C."

The 4th execution thereon was issued on October 28, 1875, returnable to December rules, 1875; is endorsed, " Rec'd this ex'on 28th Oct., 1875, John T. S. Perry, D. S.," and has not been returned. (For above 4 ex'ons see Ex. " C. G. H. 1.") The last execution thereon was issued on April 6, 1880, and returned endorsed, " No property found." (See Ex. " C. G. H," 2.) This claim was also set up by petition in this cause in 1867. (See Ex. " C. G. H," 3.)

44 It is obvious that this claim is not barred by the statute of limitations according to the rules of computation prescribed by the said decree of reference.

3d Report, pp. 57, 58.

C. G. HUSSEY & Co. *v.* JOHN N. CLARKSON & *al.*

Amount then reported, $269.33.

The original judgment on this claim was recovered at the spring term of 1857 of the circuit court of said Kanawha county, and the judgment on the forthcoming bond given thereon was rendered at the fall term of 1857 of the same court. The 1st execution on said judgment on forthcoming bond was issued on December 5, 1857, returnable to February rules, 1858; is endorsed, " Rec'd this ex'on 8th Dec., 1857, A. Moore, D. S.," and was returned endorsed, " No property found. John Slack, S. K. C." The 2nd execution thereon was issued on October 28, 1875, returnable to December rules, 1875; is endorsed, " Rec'd this ex'on 28th Oct., 1875, John T. S. Perry, D. S.," and has not been returned. (For above 2 ex'ons see Ex. " C. G. H." 1.)

The last execution thereon was issued on April 8, 1880, and returned, endorsed " No property found." (See Ex. " C. G. H." 2.)

45 This claim was also set up by petition in this cause in 1867. (See Ex. " C. G. H." 3.)

At the beginning of the said first excluded period (viz., April 17, 1861) the said 1st execution had been running 3 years 2 months and 17 days from February rules, 1858 (supposing, as before stated), and hence it had 6 years 9 months and 13 days to run after the end of said excluded period (viz., March 1, 1865). This would take it up to December 14, 1871.

According to the rules of computation prescribed by the said decree of reference, this claim is not barred by the statute of limitations.

* * * * * * *

3d Report, pp. 61, 62.

JAMES H. BROWN *v.* JOHN N. CLARKSON & *al.*

Amount then reported, $3,982.44.

The original judgment on this claim was confessed at the February term of 1857 of the county court of said Kanawha county, and

the judgment on the forthcoming bond given thereon was rendered at the July term of 1857 of the same court.

The 1st execution on said judgment on forthcoming bond was issued —— —, returnable to October rules, 1857, and the last execution thereon was issued —— —, returnable to October rules,
46 1859. At the beginning of the said first excluded period (viz., April 17, 1861) the said last execution had been running 1 year 6 months and 17 days from October rules, 1859, and hence it had 8 years 5 months and 13 days to run after the end of said excluded period (viz., March 1, 1865). This would take it up to August 14, 1873.

The remarks at page —, *ante*, as to the appearance of the claimant Brown apply also to this judgment. According to the rules of computation prescribed by the said decree of reference, this claim is not barred by the statute of limitations.

* * * * * * *

This report is completed and most respectfully submitted this 18th day of October, 1881.

PETER FONTAINE,
Com'r of U. S. C. for D. of W. Va.

"*Exceptions Endorsed on this Report.*"

PARKER
v.
CLARKSON *et al.* } In Chancery.

C. G. Hussey & Co. except to 5 report of Com'r P. Fontaine, filed in this cause 19 Oct., 1881.

(1.) They except to the several judgments reported in favor of Frank Thompson's estate because all of said judgments are barred by the statute of limitations.

See 6 rule of court, Com'r Fontaine's 4 Rep., pages 6, 19, 20; Danl. Ch'y P., vol. 2, p. 1407.

(2.) They except to the several judgments reported in favor
47 of J. H. Brown for the same reasons & because the petitions are not evidence of themselves & there is no proof to sustain them. Do., 2 D. C. P., 1407.

(3.) They except to the several claims reported in favor of Putney & Norton & R. E. Putney & Co. for the same reasons. Do.

(4.) They except to the several judgments reported in favor of J. M. Laidley, E-q., to wit, Ch. Conner, Hurt & Crocket, J. R. & K'a C., page 32, because paid; see depos. of Clarkson & Early & Laidley; & also because barred by sta. of lim.

(4.) They except to the judg't reported in favor of H. Chappell because no one has set up any valid claim thereto by assignment—he is dead & his ad. is silent—and because barred by sta. of lim. Mr. Chappell's dep. was taken & filed in this cause. It showed a small balance. It is not used in the file.

(5.) They except to all the claims reported in favor of J. Slack—

(1.) Because barred by sta. of lim.

(2.) Because paid. See dep. of Clarkson, Boing, & others.
(3.) Because no valid assignment is shown to Jno. Slack from the judg't creditors, to wit, Com'th of V., Bibby, Ruby, Rand, Mal-
48 colm, Beirne, & Ka. Sav. Inst., & Goshorns.
(4.) No sufficient petition claiming them was filed in time.
(5.) The presumption of law is they were paid out of monies of Clarkson.
(6.) Jno. Slack is proven, then, to be insolvent & cl'nt- have paid them of his own money.
(7.) The law will not entertain a novation in favor of sh'ff to prejudice of their judgment & ex'on creditors.
(8.) Jno. Slack never paid the taxes due from Clarkson. They were made a present to him by the Legislature.
(9.) Slack's claim grew out of a running debt between him & Col. Clarkson, which is barred. He had his action of ass't *v.* Clarkson for it.
(10.) After the war Slack offered to sell all his claim to Clarkson for 1,000. P. 22, dep. of '81, 2nd; see page 25, 24, 31, 36–'7, 40, 23 of Clarkson, dep. of '81.
(11.) Clarkson simply lost in the war. Laidley's dep., p. 5, 3, 4, 62, showing the large sums he paid Slack for Clarkson.
(12.) Clarkson not a volu-tary witness. He was brought here by attachment; p. 57–'8.
Ruby for Hansford is excepted to because not claimed by any one. No petition is yet filed by any claimant thereof because barred for non-claim.
Oct. 22, '81.

C. G. HUSSEY & CO.,
By SWANN.

49 In the District Court of the United States for the District of West Virginia, Sitting at Charleston, in Kanawha County, in said District.

MILTON PARKER'S ADMINISTRATOR
vs.
JOHN N. CLARKSON and Others. } In Chancery.

Office of Peter Fontaine, commissioner of U. S. court for district of West Virginia.

CHARLESTON, WEST VA., *Oct. 30th*, 1876.

To the Honorable John J. Jackson, Jun., judge of said court:

Your undersigned, commissioner, respectfully reports that the following decrees and orders of reference in the above-entitled cause have been made and entered by the circuit court of Kanawha county, West Virginia, and by your honorable court, viz:

By a decree of the circuit court of Kanawha county, West Virginia, of the 10th day of April, 1866, it was ordered, among other things, that this cause be referred to a master to take, state, and report the following accounts and facts:

"First. What personal property, if any, the defendant, John N. Clarkson, owns within the jurisdiction of this court.

"Second. What real estate the said defendant owned within
50 this State at the time the complainant's earliest judgments named in his bill were obtained and the disposition that has since been made of the same.

"Third. The liens upon said real estate, whether by trust deed, judgment, or otherwise, and the priorities of said liens.

"Fourth. Whether the rents, profits, and issues of said real estate will pay and discharge said liens within five years.

"Fifth. Such other and further matter as any of the parties may require or the commissioner deem pertinent."

See decree of Kanawha circuit court of date above specified.

Under this decree a notice of the taking of the account therein ordered was given by Henry C. McWhorter, who was at the time of giving said notice a master commissioner in chancery for Kanawha county, West Virginia.

No report under the said decree was made or filed in the cause by the said commissioner, Henry C. McWhorter, or by any other master commissioner, but a paper which purported to be a report made in pursuance of the said decree, and which was signed by Alexander T. Laidley, was filed in said cause on the 18th day of February, 1870. At the date at which the said paper was filed in this cause the said Alexander T. Laidley was not a commissioner in chancery,
51 and he had not been appointed a special commissioner in this cause. The said A. T. Laidley was subsequently, on the 21st day of June, 1870, appointed a special commissioner in this cause.

See decree of Kanawha circuit court, dated June 21st, 1870.

This paper so filed in this cause by Alexander T. Laidley is the same one that is referred to in subsequent decrees in this cause as "the report of A. T. Laidley."

See copy of paper filed in Kanawha circuit court clerk's office on February 18th, 1870.

These facts with regard to the paper that is styled "the report of A. T. Laidley" are noted here because of their bearing on the question of the bar of the statute of limitations to certain claims against the defendant, John N. Clarkson, which are set out and described in the said papers.

Your undersigned commissioner is of the opinion, and so reports, that all of the proceedings had by the said A. T. Laidley in this cause preparatory to the making up of the said paper and the said paper itself are null and void and of no effect.

* * * * * * *

52 The concluding clause of the paper referred to by Comm'r Fontaine as the report of A. T. Laidley is in the words and figures following, to wit:

"The cause was referred to Master Comm'r McWhorter, but, he not having time to devote to so laborious an examination as the case required, some parties interested in it procured me to make up the account, and with the — and assent of Mr. McWhorter I have

done so, and with his leave respectfully submit it, after having retained the report more than two days before returning it.

"February 19, 1870.

"ALEX'R T. LAIDLEY."

Exceptions Endorsed on Comm'r Fontaine's 4th Report.

* * * * * * *

C. G. Hussey & Co. except also to any judgment reported here in favor of John Slack, Early, Laidley, or Brown, because barred by statute & paid; because not set up in any proper form before the com'r until barred by sta. of lim.

C. G. HUSSEY & CO.,
By SWANN.

* * * * * * *

53 They further except to any allowance to Laidley, Brown, Slack, Chappells' adm'r, & all other creditors of J. N. Clarkson named in this report who did not file their petitions before the com'r for their claims, supported by proper affidavits, before their respective claims were barred.

SWANN,
Att'y for Exceptants.

* * * * * * *

John Johns, assignee in bankruptcy of John N. Clarkson, bankrupt, excepts to the allowance by the commissioner of each and every claim allowed and reported by him to the persons named in the foregoing report, because—

1st. Each and every of said claims was and is barred by the statute of limitations; and

2nd. The said claims and each of them were allowed by said commissioner without sufficient — to support them or either of them.

JAMES H. FERGUSON,
Counsel & Att'y for said Assignee.

54 I, Jasper Y. Moore, clerk of the district court of the United States for the district of West Virginia, do hereby certify that I have examined the 5th report of Commissioner P. Fontaine in the chancery cause of M. Parker's adm'r *vs.* J. N. Clarkson & *als.*, and do not find in said report the judgment in favor of J. H. Brown for $529.76, as allowed in said final decree entered Dec'r 12th, 1885.

In testimony whereof I hereto set my hand and affix the seal of my said court, at Charleston, in said district, this 10th day of August, A. D. 1888, and in the 113th year of the Independence of the United States of America.

{Seal of District Court United States, District West Virginia, Charleston, West Va.}

JASPER Y. MOORE,
Clerk D. C. U. S., D. W. Va.

55 I, Jasper Y. Moore, clerk of the district court of the United States for the district of West Virginia, do certify that the foregoing are true copies of and extracts from the record and proceedings in the chancery cause of Milton Parker's adm'r *vs.* John N. Clarkson & *als.*, lately pending in my said court, at Charleston, and called for in order of Supreme Court of the United States, dated January 23rd, 1889.

In testimony whereof I hereto set my hand and affix the seal of my said court, at Charleston, in said district, this 29th day of January, 1889, and in the 113th year of the Independence of the United States of America.

{Seal of District Court United States, District West Virginia, Charleston, West Va.}

JASPER Y. MOORE,
Clerk D. C. U. S., D. W. Va.

56 [Endorsed:] Supreme Court U. S. October term, 1888. No. 342. L. N. Young *et al.*, app'ts, *vs.* E. B. Knight *et al.* Writ of certiorari and return. Filed Jan. 31, 1889.

MAR 2 1889
JAMES. H. McKENNEY
CLERK.

[No. 342—October Term, 1888.]

SUPREME COURT

— OF THE —

UNITED STATES.

L. N. YOUNG, ET ALS., Appellants,

vs

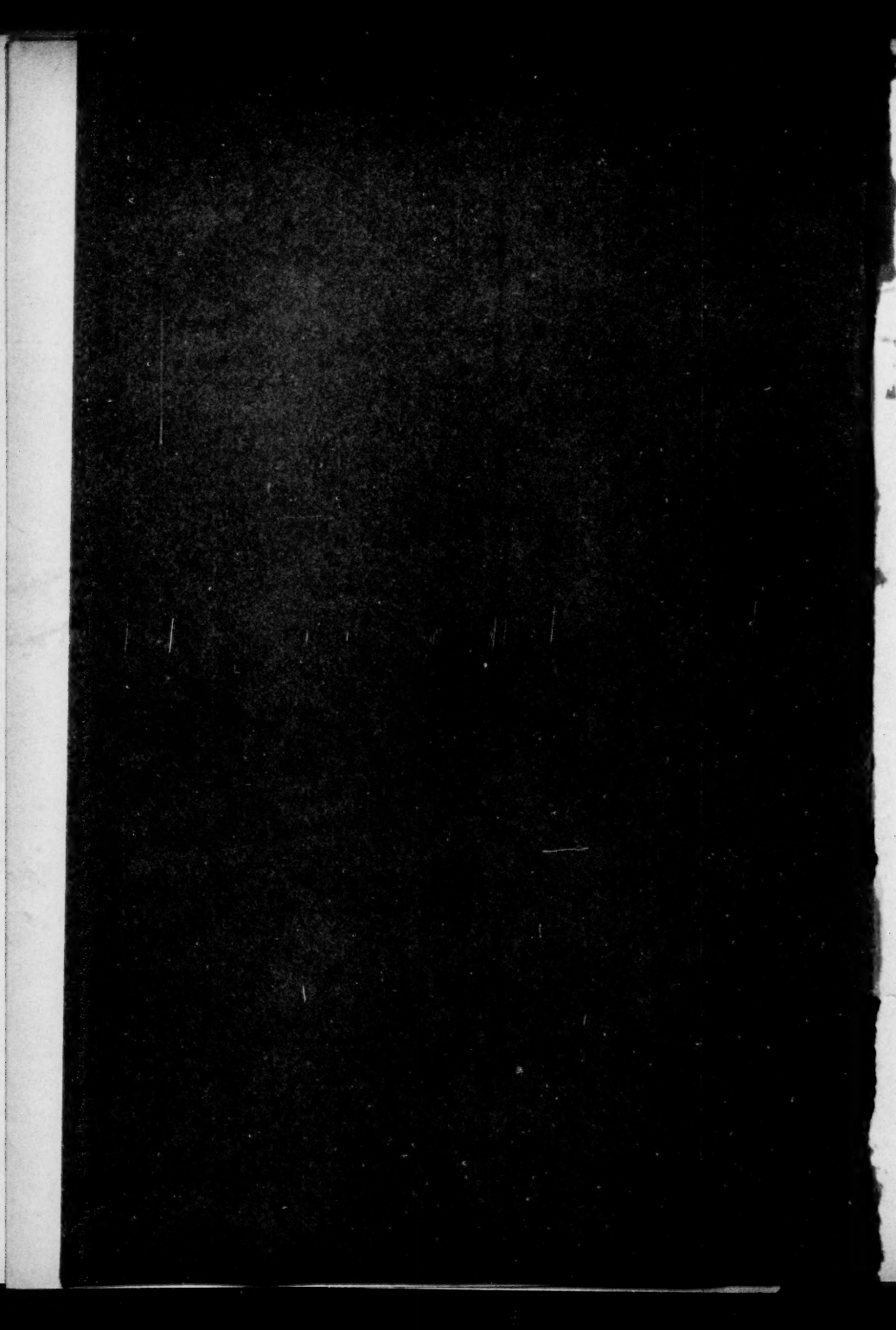
E. B. KNIGHT, ADM'R, Appellee.

BRIEF FOR APPELLANTS.

Attorney for Appellants.

CHARLESTON:
W. L. MOURE, PRINTER.

1889.



IN THE

SUPREME COURT

— OF THE —

UNITED STATES.

L. N. YOUNG, ET ALS., Appellants,
vs
E. B. KNIGHT, ADM'R, Appellee.

BRIEF FOR APPELLANTS.

STATEMENT OF FACTS.

August 14th, 1852, (page 7,) John N. Clarkson executed a deed of trust to J. J. Williams, conveying very valuable personal estate, and sundry tracts of land, among them the 1¾-acre lot in Charleston now decreed, in this suit, to be sold. Among the debts secured by this deed was one due James Clarkson, of $7,000, (p. 8,) amounting, when this suit was brought, to some $14,000, and prior to all other debts then due.

July 21st, 1858. John N. Clarkson conveyed this lot to T. B. Swann for $2,372.99, and on the same day, James Clarkson, the beneficiary, released (assigned) his interest in it, under the trust, to Swann. (Page 12.)

January, 1860. Swann conveyed part of this lot to Mays, and January 31st, 1860, the residue, except a small portion, which he had conveyed to Bryant. (Pages 14, 15.)

June 14th, 1864. Mays conveyed it to John D. Young. (Page 15.)

December, 1865, Milton Parker instituted this suit. (Page 1.)

We note here that when this suit was brought, all the personal estate named in the trust deed had been destroyed, or lost, in the war. That all the lands named in the trust, except this 1¾-acre lot, and the lot which we will call the Jeffries or Ruffner lot, were lost to the trust in consequence of prior liens, &c. (See the bill, page 4.)

We note further, that *none of the debts*, for the satisfaction of which this lot is now decreed to be sold, were set up in *the bill*. And note further, (see extract from the deposition of John N. Clarkson,) that all the debts named in the trust deed to Williams, except the debt due James Clarkson, had been paid. (Page 29.)

1866. The Circuit Court of Kanawha county made an order referring the case to Commissioner McWhorter to take and state an account, &c. (Page 25.) The account was not taken by Commissioner McWhorter, but a private gentleman, wholly unauthorized, Mr. A. T. Laidley, prepared what is called an account, showing many debts, judgments, &c., vs. John N. Clarkson, and the same was informally filed with the papers of the cause in 1870, and was, by Commissioner Fontaine's first report, reported and held of no effect and for naught. (Page 26.)

1872, (page 34, and amended record, page 5). Both Young and Mays died this year, before the case was removed from Kanawha Circuit Court and transferred. (Amended record, page 5.) Each left heirs; and Young left heirs and a son who was his vendee; and these heirs, except one, sold to others.

(See petitions of M. W. Young, page 65, and the answers filed by M. W. Young and others, page 58.)

July 21st, 1873. This court made an order referring the case to A. T. Laidley, (page 23,) who had been appointed commissioner by the Circuit Court of Kanawha, sometime after his paper was filed called an account, to take an account. Mr. Laidley, now, for the first time, a commissioner, did not take the account, and on December 24th, 1873, an order was made directing Commissioner Fontaine to take the account, (page 23,) "after giving notice to *all parties in interest*, and not to report any judgments or other claims against the Defendant, J. N. Clarkson, except in accordance with the rules of this court, and unless laid before him by *affidavit, petition, &c., by the claimants.*" Commissioner Fontaine took the account, reported the so-called account taken by A. T. Laidley before the cause was removed to this court, as illegally taken, unauthorized and of no effect. (See Commissioner Fontaine's Report, page 26.)

And we note an extraordinary order authorizing Commissioner Fontaine to adopt the illegal, so-called report of A. T. Laidley, a private gentleman, (page 26,) after the filing of his first report rejecting it. This order is dated December 24th, 1873.

In 1877, (page 27,) an order is made re-committing this report No. 1, directing the account to be retaken on any further evidence, &c.

November 20th, 1878, (page 27). Commissioner Fontaine's second report is re-committed, and he is directed *not to report* any claim to which the claimant, or some one for him, *does not file his claim in writing*, together with some affidavit or deposition, showing that it has not *been paid in whole* or in part, and the claimant's interest therein.

We note, this order does not authorize Commissioner Fontaine to *adopt Mr. Laidley's so-called report;* and we ask, how could the court authorize this paper to be adopted as authentic, when every thing done by Mr. Laidley was illegal and void, and no one under any legal obligation to appear before him, either to prove an account or contest it, he (Mr. Laidley,) not

being a commissioner and under no sworn obligation? And we ask, how could Mays' heirs or Young's heirs, or vendees, Mays and Young being long dead, and no bill of revivor against the heirs, *no supplemental* bill against their vendee or Young's vendee, come before the commissioner, to contest the claims, or before the court to contest this and other proceedings?

January, 1881, (page 28). Commissioner Fontaine's 3d report is re-committed.

May 27th, 1881, (page 30). Commissioner Fontaine's 3d and 4th reports are re-committed, and among other things, he is ordered to report the date of the first and every succeeding execution, if any, and of each of the judgments named in his reports, the return thereon, &c., and what claimants of said judgments, appeared before him, or Mr. A. T. Laidley, (called Commissioner in this Order,) in person or by attorney, and proved their claims, and how, &c., and who filed petitions or affidavits before him or Laidley, (the private gentleman,) and the date of filing, &c., &c., which of said judgments are barred by the statute of limitation, and directing him, as to the time when the statute began to run, &c., (as provided in our Code, chapter 139, section 11, which will be presently quoted,) which limits an action on a judgment, as the longest time, to ten years from its date, and prescribes the *same period for a scire-facias;* and this order specifies that the statute shall begin to run as to M. Parker, the plaintiff, at the date of the suit, and as to the claimants of judgments as appeared before him or Laidley (who was not a commissioner,) and filed petitions or affidavits, &c., at the date of filing the same, and as to all other claimants, on the 24th December, 1873. The Court reserving the right to pass upon the statute as to all such cases in which the parties appeared before either of said commissioners, &c., calling A. T. Laidley a commissioner, in person or by council, and offered proof of their claims, &c., on the coming in of his report. The Commissioner to give notice by publication to *all parties in interest*, and take any evidence about the claims, &c., offered. There was as yet no revivor against Swann, or Young or Mays, or their heirs or vendees.

We note here, that none of these judgments, for the payment of which this 1¾ acres of land is now decreed to be sold, *were set up in the bill.*

We note, that the order of reference made by the Circuit Court of Kanawha county, (see Commissioner Fontaine's first report,) is dated April 10th, 1866. (Page 25.) That under this order no account was taken, but that Mr. A. T. Laidley, between April 10th, 1866 and 1871, filed a paper which, purporting to be an account, was held for naught.

All of the judgments for which this 1¾-acre lot are decreed to be sold, were rendered in 1856 or in 1857.

The first account, lawfully taken in this case, was by Commissioner Fontaine, under an order of this court dated January 24th, 1873, (page 23,) or seventeen years after the judgments of 1856, and sixteen years after the judgments of 1857, and after the death of both Young and Mays. Our statute of limitations adopted by the court by analogy in this case and made to apply in the account to the judgments named in this report, is ten years, and the same is the limitation on a *scire facias*.

October 18th, 1881, (amended record, pages 8 to 19, inclusive, and commissioner's remarks, page 19). Commissioner Fontaine filed his fifth and last report under this last order of reference, (record, pages 29-30,) and he sets out in full, all the judgments, for the satisfaction of which, this 1¾-acre lot is now decreed to be sold, as rendered in 1856 or 1857. That none of these judgment creditors *had appeared* before him in any way, but that they had made appearance before Mr., not Commissioner, A. T. Laidley, (Mr. A. T. Laidley was appointed commissioner by the Kanawha Circuit Court, after he filed his account taken in 1870, taken without authority,) and Commissioner Fontaine says in this report that he considered Mr. A. T. Laidley's report lawfully made, and the appearance before him, a private gentleman, a lawful appearance, (amended record, page 11,) and that he had adopted Mr. Laidley's so-called account and the appearance of these creditors before him as lawful, although in his first report, not excepted to for that reason, he had reported Mr. Laidley's so-called account as

illegally taken and void. (Pages 25 and 26, and amended record, page 21.)

Commissioner Fontaine further reports that if this appearance before Mr. Laidley was lawful, these several judgments were not barred, but if irregular and not lawful, they were barred. This report was excepted to by Hussey & Co., on the ground that they were not set up in proper form before *any* commissioner. (Amended record, pages 19 and 22.) A. T. Laidley was a private gentleman, not a commissioner in chancery, and therefore, every thing done by him, or before him, should be held for naught. And, therefore, as these judgment creditors had not appeared before Commissioner Fontaine in pursuance of the several orders of this court, these judgments were barred by the ten year's limitations.

The court, in 1881, (page 31,) overruled the exceptions, and held these several judgments rendered in 1856 and '57, not barred by the statute; and we note, that although these accounts were progressing under the five orders of reference, the first dated 1873, each requiring all claimants to prove their accounts before Commissioner Fontaine, yet not one of them appeared before him or in court. Is not this conclusive, that they thought they could make nothing out of the suit, and had abandoned it? And we ask how could this court adopt, hold as good, and make a decree on the basis of an account and so-called report taken and made in 1870, by a private gentleman, Mr. A. T. Laidley, without any authority whatever, and held and treated for naught under his (Commissioner Fontaine's) first report? And that too against the heirs of Mays, and the heirs and vendees of Young, both of whom were dead when this cause was referred to Commissioner Fontaine in 1873, and both dead before the cause was transferred to this court, and the cause not revived against their heirs or J. D. Young's vendees.

Note, John D. Young and E. Mays, who had been in possession of this 1¾-acre lot since 1860, could not appear before Commissioner Fontaine to contest these judgment creditors' claims, and they certainly were under no obligations to appear before Mr. A. T. Laidley; nor could their heirs or vendees, for

the suit had been in abeyance as to them, and suspended by the death of these two defendants, Mays and J. D. Young, and until put in motion under and by the forms of law.

All the proceedings were void as to them; as to Mays and J. D. Young's heirs, the suit was revived by bill of revivor, more than twelve years after their deaths. Here, then, is a case where these heirs and vendees, in undisputed possession of this property for more than ten years, are decreed to lose it by proceedings wholly void as to them, and in which they could not and did not appear; and were not made parties either by bill of revivor or supplemental bill.

Note the closing remarks of A. T. Laidley, in his so-called report, (amended record, page 21,) which was held for naught by Commissioner Fontaine's first report, and adopted in his fifth and last report, so far as to prevent the statute of limitations, &c.

Laidley remarks: "The cause was referred to Master Com-
" missioner McWhorter, but he not having time to devote to
" so laborious an examination as the case required, some parties
" interested procured me to make up the accounts, and with
" the ——— and assent of Mr. McWhorter, I have done so,
" and with his leave respectfully submit it, after having retained
" the report two days before returning it.

" ALEXANDER T. LAIDLEY.

" February 19th, 1870."

Our Code, chapter 130, section 7, prescribes that a commissioner in chancery shall retain his report ten days; "and when
" it is completed, unless it be otherwise ordered by the court, or
" agreed by the parties, he shall retain it ten days for their ex-
" amination."

And now, in 1883, (page 37,) a bill of revivor is filed against the heirs of Young and Mays, in behalf of these above named judgment creditors, by E. B. Knight, administrator of M. Parker, deceased, whose intestate has no interest in the matter, over eleven years after the death of both Young and Mays, and the vendee of John D. Young, one of his children, and the ven-

dee of two of his children, have not even yet been brought before the court by a supplemental bill in the nature of a bill of revivor, for they cannot be brought in by a simple bill of revivor. (See their petition, pleas, &c., pages 54, 59, 65; amended record, page 2.)

The court now, under this state of facts, under this unheard of manner of taking an account, by virtue of an order made in 1873, after the death of both Young and Mays, the suit having abated and been suspended by their deaths in 1872, as to them and before any sort of revivor, as to their heirs, and after, during the suspension, four different orders of reference and recommittals, and on the basis of accounts made off by a private gentleman, A. T. Laidley, and on a bill of revivor filed eighteen years after suit was brought, and more than eleven years after the suspension of this suit, by the death of Young and Mays, enter a decree in 1885, (page 49,) directing this lot, so held by Young's and Mays' vendees, heirs and survivors, unquestioned since their death in 1872, to be sold in satisfaction of judgments rendered in 1856 and 1857, about which no proof whatever has been *lawfully taken*, which judgments are not set out in the bill filed in 1865, and which judgments were seventeen years old, and barred by the statute before the order of reference for an account made by this court in 1873. The court in this very case adopts the ten years' statutory limitations for suits on judgments, and applies it by analogy, but refuses to adopt and apply by analogy the ten years' limitations as to a *scire facias* to a bill of revivor which is in the nature of a *scire facias* prescribed in the same section of the Code.

See Code, W. Va., chapter 139, sections 11 and 12.

Section 11:

"On a judgment, execution may be issued within two years "after the date thereof, or if none be so issued, the court in "which the judgment was rendered, may thereafter, and within "ten years from the date of the judgment, upon ten days' notice "to the party against whom the same is, order an execution "to be issued thereon for such sum as remains unpaid. Where

"execution issues within two years as aforesaid, other executions "may be issued on such judgment, without notice, within ten "years from the return day of the last execution issued thereon, "on which there is no return by an officer, or which has been "returned unsatisfied.

"*And an action or scire facias* may be brought upon judg- "ment on which no execution issued within the said two years, "or where there has been a change of parties by death or other- "wise, at any time *within ten years* next after the date of the "judgment. * * But if such action or *scire facias* be against "a personal representative of a decedent, it must be brought "within five years from the qualification of such representa- "tive."

Section 12: "No execution shall issue, nor any *scire facias* or "action be brought on a judgment in this State, other than "for the State, after the time prescribed by the preceding sec- "tion, except that in computing the time, the period mentioned "in the fourth section of chapter 136, and any time during "which the right to sue out execution on the judgment is sus- "pended by the terms thereof, or by legal process, shall be "omitted."

The fourth section of chapter 136, above referred to, is in these words:

Chapter 136, section 4: "In computing the time within "which any action of debt, detinue, covenant, assumpsit, trover, "trespass, or case pending at the time this chapter as amended "takes effect, shall be barred by any statute of limitations, the "period from the 17th day of April, 1861, to 1st March, 1865, "shall be excluded from such computation."

I may be excused for having stated above some matters that need not be considered in passing upon laches and the statute of limitations, as applied to bills of revivor.

RECAPITULATION.

And now to give, by way of repetition, the several dates to be considered in this connection:

August 14th, 1852. Trust deed, John N. Clarkson, to Williams. (Page 7.)

July 21st, 1858. John N. Clarkson, deed to T. B. Swann, and James Clarkson, release (assignment,) this 1¾-acre lot. (Page 12.)

January, 1860. T. B. Swann to Mays, two deeds conveying all of this 1¾-acre lot, except a small portion sold by him to Bryant. (Pages 14, 15.)

June, 1864. Mays' deed to J. D. Young, this 1¾-acre lot. (Page 15.)

December, 1865. M. Parker institutes this suit. (Page 1.)

1866. Kanawha Circuit Court makes an order of reference to Commissioner McWhorter. (Page 25.)

1870. Mr. A. T. Laidley, a private gentleman, files a paper called an account, purporting to state debts, &c., due by John N. Clarkson. (Amended record, page 21.)

1872. Cause transferred to and docketed in this court. (Page 20.)

1872. John D. Young dies; also, Mays. John D. Young leaves heirs and a vendee of part of this lot. Mays leaves heirs. (Pages 36-7, 59.) And before this cause was transferred to this court. (Amended record, page 5.)

May 21st, 1873. This Court makes an order of reference to Commissioner Fontaine to take an account. (Pages 23, 24.)

1877. Commissioner Fontaine's first report re-committed for account. (Page 27.)

1878. Commissioner Fontaine's second report re-committed, &c. (Page 27.)

May, 1881. Commissioner Fontaine's third report re-committed.

May, 1881. Commissioner Fontaine's third and fourth reports re-committed, with full instructions, &c. (Page 28, and see amended record, page 9.)

October 19th, 1881. Commissioner Fontaine files his fifth and last report. (Amended record, page 8.)

1856 and 1857. Dates of the several judgments, for the payment of which, by the sale of this 1¾-acre lot, this bill of revivor is filed. (Amended record, pages 11 to 19.)

October 19th, 1881. Commissioner Fontaine's fifth and last report shows that no proof, affidavit or petition was ever laid before him, in support of either of these several judgments rendered in 1856 and 1857. That the only claims made to them *was in* 1870, *before Mr. A. T. Laidley*, a private gentleman, without any authority to take an account, &c., &c. (Amended record, pages 9, 10, 11, 12, and particularly page 12.)

These judgments were, some of them, nine and ten years old when the suit was brought, and they were not set up by the bill or any pleading. They were fourteen years old, and barred, when named before Mr. A. T. Laidley. They were seventeen years old when this court made the order of reference in 1873, and twenty-seven years old when this bill of revivor was filed.

This bill of revivor was filed in 1883, (page 33,) thirty-one years after the deed of trust, J. N. Clarkson to Williams; twenty-five years after John N. Clarkson's deed to Swann, and James Clarkson's release, (assignment to Swann of his interest under the trust, to Swann; his debt being prior in point of time to all others,) and twenty five years after Swann took possession, which has remained in him and his vendees, &c., ever since—twenty-three years after Swann's deed to Mays; eighteen years after this suit was brought, and nearly twelve years after the death of Young and Mays, and no supplemental bill yet filed against M. W. Young, who got a deed from John D. Young, or Young's two children, who deeded their interest to M. W. Young. And yet this court decrees that this 1¾-acre lot is to be sold to pay them.

LACHES AND THE STATUTE OF LIMITATIONS.

The rules of practice of the court of equity as to laches and delay, where equity has exclusive jurisdiction when there is no statutory limitation at law, that can be adopted by analogy, are peculiar to that court. Where, however, there is a statutory limitation at law, it is uniformly adopted by analogy, both as to pleading and as to the merits, even where the jurisdiction of equity is exclusive. When the subject of the suit is real estate, and there is a limitation at law, as in ejectment, that limitation is uniformly adopted by analogy, (and so with personal estate).

9 Peters, page 416, Platt v. Vattier *et als.*

6 Peters, page 61, Miller v. McIntyre.

2 Vesy Jr, page 11, Jones v. Turkesville.

The same rule applies to personal estate.

17 Wallace, page 78, Harwood v. R. R. Co.

94 U. S. R., pages 806–12, Sullivan v. Portland R. R. Co.

And where the jurisdiction of equity is not exclusive, the statute of limitations, if any, is uniformly adopted by analogy.

Laches and negligence in prosecuting a suit in bills of review, amending bills, bills of revivor, supplemental bills and pleadings generally, is as much condemned, and as fatal as in the matter of instituting suits, and statute limiting pleadings and actions at law, are uniformly adopted by analogy, and applied by courts of chancery.

In the oldest case reported, as to limiting a bill of revivor, this is the doctrine, and although in that case, and 1 Pr. Wms., 742, the chancellor gives countenance to a case decided in 1727, by Lord King, making a distinction, (not afterward sanctioned by any case,) as to a bill of revivor after an account was ordered, yet it was clearly intimated that, had there been a limitation to a *scire facias*, the court would adopt it.

2 Scholes and Lefroy, 607.

The court says that had there been a limitation to a *scire*

facias, the court would adopt it by analogy. And we note, our Code, above cited, makes ten years a limitation to a *scire facias*, and we note the order to account in this case, (1 Pr. Wms.,) was made and the account taken and excepted to, during defendant's life time, and excepted to by him. 2 Vesy Jr., page 87, (4 Bro. C. C., 252,) Hercy v. Dinwoody. These cases were reviewed, and the distinction made in Pr. Wms., 742, is overruled. And in our case, the order of reference under which these accounts were taken, was made after the death of both Young and Mays. See, also, Milford and Tyler's Pleading in Equity, page 376, and all other text-books, where it is broadly laid down that the statute of limitations is made to apply to bills of revivor. The limitation in law as to a writ of error, applied in equity to a bill of review.

Sto. Eq. Pl., section 410.

10 Wheaton, page 146, Thomas v. Harvey's Heirs.

Cooper's Eq. Pl., 167; St. Eq. Pl., section 484.

All these authorities sanctioned and approved.

1 Howard, 189, Bowman v. Wather.

1 Howard, 161, McKnight v. Taylor.

9 Peters, 405–416, Platt v. Valters.

94 U. S. R., 812, Sullivan v. P. & R. R. R. Co.

I respectfully submit, the analogy between a *scire facias* and a bill of revivor, is more intimate than that between a bill of review and an appeal.

STATUTE OF LIMITATION APPLIED TO AMENDED BILL.

6 Peters, 61, Miller v. McIntyre.

This suit should have been revived before the order of reference by this court in 1873, to bind the survivors and alienees of these defendants. Those judgment creditors were guilty of negligence in not setting up their judgments, before the commissioner of this court, in or under any one of the five different accounts taken by him under the several orders of reference,

requiring them to appear with their proof, of each of which taking these accounts, they were notified. We naturally conclude they had abandoned their claims. Their first appearance any where is by a bill of revivor, filed more than ten years after the first order of reference, and some twelve years after the death of these defendants, not having at any time proved their claims before any commissioner at all.

Are parties to be bound by proceedings had during the abatement and suspension, by the rules of equity, as to all right to proceed against them? But of this presently.

We will now note, with the forbearance of the court, extracts from the rulings of the court in several cases. This whole matter is settled in 12 Wheaton, Thomas v. Harvey's heirs, page 146:

"Courts of equity uniformily adopt the limitations prescribed "by parliament in legal proceedings, and apply it to similar "cases in equity."

2 Vesy Jr., page 87, Hercy v. Dinwoody, (4 Bro. C. C., 257,) the court says:

"The first case insisted on, in support of this claim, is Hol- "lingshead's case." (1 Pr. Wms., 742.) And the court notes the distinction as very extraordinary, and disapproves it.

In this Pr. Wms case, the court intimates that limitations would not apply to a bill of revivor after a decree for an account, but the account was taken and *excepted to by the defendant before he died*, and yet the court, in 2 Vesy, holds that the statute ought to have been applied by analogy.

Please note the facts in this case, in 2 Vesy.

In 2 Vesy, pages 272–581, the court says:

"Every fair presumption that can possibly be made shall be "made against a stale demand. It may arise from acts of the "parties; or the very forbearance to make the demand, affords a "presumption either that the claimant was conscious that it "was satisfied, or intended to relinquish it."

4 Vesy, page 627, Pearson v. Belcher:

"In 1752, an account was decreed against all the defendants "except those, as to whom the bill was dismissed. The bill "had been filed in 1749," &c., &c.,

"In 1781, an original bill in the nature of a bill of revivor, "was filed. The court refused to entertain the bill on account "of the delay. There was no limitation to a *scire facias* in "England at the time."

As we have stated, ten years, by our Code, is a bar to a *scire facias;* and 2 Scholes and Lefroy, page 607, holds that equity will adopt and apply the time limited to a *scire facias* at law; and in 10 Wheaton, 146, Thomas v. Harris' heirs, the court adopted the limitation applied by Congress to an appeal, and applied it to a bill of review.

And see Sto. Eq. Jr., section 1520, where we see the doctrine of applying the statute in chancery is universal. And 7 Grattan, Va., page 112. Smith *et al's* v. Thompson's administrator; see also 1 Kernan, N. Y., 174; Metcalf v. Metcalf, where it is held as an inflexible rule, that all parties in interest, must be brought before the court; also, 19 Illinois, 320, Prentis v. Kemball.

1 C. E. Green, N. J., page 251, Shipman v. Cook: Bill dismissed because suit had not been actively prosecuted during ten years. (This suit has not been prosecuted at all against the representatives of Mays and Young.)

2 John. Ch. cases, page 432, Ray v. Bryant: Bill for account dismissed, for delay, lapse of time, death, &c., though the laches were only eleven years. Same.

1 Edward's Ch., page 347.

95 U. S. R., 157, above cited.

In 6 Peters, 61, Miller v. McIntyre, above cited: a bill was filed in 1808, for the purpose of obtaining a legal title to a tract of land, claiming that plaintiff's ancestor, in 1802, made an entry of the land, which was surveyed in 1804, and patented in 1820, &c.

In 1815, seven years after this bill was filed, an *amended bill* was filed, setting up an older patent than the complainant's. It was insisted that the amended bill, filed seven years after the original bill, had relation to the commencement of the suit, and consequently the statute could not bar under the amended bill, &c., &c.

The court held otherwise, and applied the statute to the amended bill, *on the grounds that until the defendants were made parties* the suit could not be considered as having commenced against them. So the court adopted the statute (20 years) by analogy, and applied it to an amended bill. Certainly, neither Mays nor his heirs, nor J. D. Young's heirs nor Young's vendee or the vendees of Young's heirs, have had any notice of the various orders of reference above cited, accounts taken, decrees &c., during the 12 years after the death of J. D. Young and Mays, before any notice to them by the forms of law, by bill of revivor, as to the heirs, or by supplemental bill as to Young's vendees (and no supplemental bill as to J. D. Young's vendees has been yet filed.) It is bad enough not to have dismissed this bill of revivor. It is worse to decree a sale of this land, without ever having given them an opportunity to be heard. Had they been made parties they might have objected to the transfer of this case to this court, which was clearly illegal, and they might have successfully objected to the decree of this court on the statute of limitations, as in Commissioner Fontaine's 5th and last report, and they might have appealed from that decree, and they might have proven we know not what. They have been by this decree deprived of their land held by them for over 12 years after J. D. Young's death, unquestioned. The orders of account, depositions taken, decrees, re-commitals, were proceeding against the dead, and without a hearing given to their survivors, according to the forms of law, and rules of pleading.

(According to 6 Peters, p. 63, above, we note there should have been a replication to our plea of the statute of limitations; there has been none.)

BILL OF REVIVOR, WHEN NECESSARY, &c.

It will not be questioned that the death of a defendant in a suit in chancery, abates, or rather suspends, the suit and all proceedings thereunder as to him and his representatives, heirs, &c., and that it cannot be put in motion, so as to effect his heirs and personal representatives, but by a bill of revivor; or his vendee, or the vendee of his heirs, by a supplemental bill in the nature of a bill of revivor.

It is seen from this record that all the evidence taken in this cause, and every order, decree, reference, re-committal, &c., reports of the commissioner, &c., (and they were many,) were done after the death of both Mays and Young, and during this abatement or suspension as to them; and yet the suit not put in motion as to them, and they not brought in by any form of law known to chancery courts, and that not one of these judgment creditors ever appeared before the court or commissioner in all these twelve years, after the abatement of this suit, and that none of these defendants had an opportunity or notice to appear and defend their rights in any way. That the land of these defendants should be decreed, in ~~1882~~ 1885, under these circumstances, to be sold, &c., appears to us most extraordinary, and taking a man's property without hearing him, or giving him an opportunity to be heard.

Why was this bill of revivor not presented for more than twelve years after this abatement? Manifestly because the claim against this lot was never in the mind of the judgment creditors, or had been abandoned. And why did not one of them ever appear before the commissioner, or prove his claim? Manifestly because they were wholly indifferent; because they thought it would be useless.

11 Wallace, 96; Alberry v. Bank.

"Death of a defendant suspends all proceedings in a suit "from the want of proper parties, and is dead at common law. "The suit is absolutely dead. But in equity, is in a suspended

"condition, and all proceedings as to the dead defendant become "abated as to him."

See Sto. Eq. Pl., §354.

And when the interest of the dead defendant is transmitted to that representative which the law gives or ascertains, so that the title cannot be disputed, at least in a court of chancery, but the person in whom the title is vested is alone to be ascertained, the suit may be continued by a bill of revivor.

Sto. Eq. Pl., section 364.

See also W. Va. Reports, Stockton *et als.*, v. Copeland *et als.* February 4, 1888.

If anything is required to be done by or against the interest of a party who is dead, his proper representative must be brought before the court by a bill of revivor.

See Eq. Pl. section 369, 3 John. Ch. R. 60, Nicole v. Rosevelt.

In 3d Otto, (93 U. S.,) the court says:

"A sentence of a court pronounced against a party without "hearing him, or giving him an opportunity to be heard, is not "a judicial determination of his rights," &c., &c.

2 Peters, page 482; Mandeville *et als.*, v. Riggs, (see pages 486-7,) the court says:

"In the present case we are of opinion that upon the death of "the parties who were before the court, the bill ought to have been "revived," &c., &c.

"If they are not before the court, they cannot be bound by "the decree," &c.

12 Peters, 164; Clark v. Matherson *et al.*, the court says, page 171:

"But in courts of equity an abatement of the suit by the death "of a party has always been held to have a very different "effect, for such abatement amounts to a mere suspen- "sion, and not to a determination of the suit. It may

"again be put in motion by a bill of revivor, and the proceed-
"ings being revived, the cause proceeds to a regular termina-
"tion as on original bill. The bill of revivor is not the
"commencement of a new suit, but is the mere continuance of
"the old."

1 Alabama, page 725, Doe *ex demise* Daniels heirs v. McClosky, the court, reviewing the csaes, says:

"Whenever the interest of a party to a suit survives him,
"the suit abates as to the interest of the party dying, and to ef-
"fect his survivors there must be a revivor against the survi-
"vor, otherwise the ends of the suit cannot be attained."

And we note here, that the suit having abated as to Young and Mays, who died in 1872, abated also as to their vendor, Swann, as see

3 Bland's Ch. (Md. R.) page 551-600; Neal v. Hawthorp, where the court says:

"Whenever the bill claims relief against several, &c., (the ti-
"tle being of common derivation,) *and one dies, the suit abates*
"*as to all.*"

These defendants have been in possession of this property for more than twelve years after Young's death, unquestioned by any bill of revivor, and now, more than twelve years after the death of Young and Mays, a bill of revivor is filed, to do what? to get a decree to sell this property on accounts taken under orders of reference begun in 1873, after Young and Mays' death, on five several accounts, taken under four re-committals after the first order of reference in 1873. That is, during the abatement of a suit, or, rather, it's suspension by the defendant's death, and before any revivor as to their representatives; before it is again put in motion under any form of pleading known to equity practice; and hence, without any notice to these defendants, the plaintiff can go on, do what he wishes, prove what he pleases, make a case himself, and then, after all is over, bring the defendants in court by a bill of revivor,

and have a decree against them without a hearing, and sell their property. This is most extraordinary, and this is what the court has done.

We now call the attention of the court to the answer of the Young's, survivors to Jno. D. Young, filed 28th May, 1885, page 58; to the pleas of M. Young and John Young, filed December 10th, 1885, (page 54;) and to the petitions of Jno. M. Young, M. W. Young and Hettie Slack, filed December 11, 1885, (page 59.)

This petition sets out that Hettie Slack, wife of John Slack, and daughter of J. D. Young, dec'd, conveyed her interest as heir of her father, (J. D. Young,) to M. W. Young, 187–. That L. N. Young, son and heir of J. D. Young, dec'd, had conveyed his interest in the lot to M. W. Young, 1874; so it thus appears that M. W. Young held the interest of two of the children and heirs of J. D. Young by deed, and this interest could not be reached by a bill of revivor. This is manifest.

See Sto. Eq. Pl. sections 364, 378–9, 387.

2 Page, 360; Douglas v. Sherman.

2 Alabama, 411.

3 Otto, 274; Winder v. McVeigh.

And here we might stop. If we are right, the court need not go further.

We now call the attention of the court to this very important development of facts which will, of themselves, cause this court to order a stay of this decree until these facts are adjudicated, or set aside, if nothing else can be done.

This final decree here appealed from was entered on the 12th December, Fall term, 1885, (page 49.) The court was adjourned on the 14th December, 1885, to the 4th of July, 1886, (amended record, page 1.) On the 8th of July, 1886, at this adjourned term, M. W. Young and others presented their petition above set out, for a re-hearing, (page 59, and

amended record, page 2,) and it was entered; and thus this petition was entered before this decree became final; that is, before the term was adjourned finally. And the decree was thus suspended until the Spring term, 1886.

At the Spring term, 1886, May 6th, the court made an order dismissing this petition of M. W. Young and others, (page 65, and amended record, page 3,) and adjourned the term to the 10th June, 1886, (amended record, page 4.)

At this adjourned term on the 8th July, 1886, M. W. Young filed his petition asking that it be held, if more appropriate, as a bill of review, (page 64-5, and amended record page 4,) and so at the same term of the court at which the final decree was entered, M. W. Young, L. N. Young and America Dix, filed their petition.

At the next regular term, (Spring, 1886,) this petition was dismissed; and at the adjourned term, 1886, (before the final decree,) M. W. Young filed his second petition, showing that he held no interest in this lot as heir of his father, but that he held the much larger portion under a deed for valuable consideration, executed to him by his father before his death; and nearly all the residue of the lot by deeds from his brothers and others; and he asked that the matters set out in the petition, if more proper, be treated as a bill of review. (Amended record, page 8.)

This petition has never been passed on by the court, and we respectfully submit that it has suspended the decree, and the decree should be set aside, &c., at the least, until this petition be passed on.

Be this as it may, we say that the bill of revivor, under these facts, is inapplicable and inappropriate, and the rights of M. W. Young cannot be adjudicated as the case now stands, *on a bill of revivor.*

He holds the bulk of the lot under a deed from his father, not as heir; and nearly all the residue under deeds from his brothers and others, and these, his rights, cannot be brought before the court, or adjudicated under and by a bill of revivor,

but only under a supplemental bill in the nature of a bill of revivor.

See above authorities, to-wit:

Sto. Eq. Pl. sections 364, 378-9, 387.

2 Page, 360; Douglas v. Sherman.

2 Alabama, 411.

3 Otto, 274; Windsor v. McVeigh.

And we say this petition of M. W. Young is proper as such, and may, if necessary, be treated as a bill of review.

18 Wallace, 163; *ex parte* Lane.

13 Peters. 6; Whiting *et als*, v. Bank U. S.

2 W. & M. 169; Hunter v. Town of Marlboro.

3 W. & M. 403; Bentz v. Phelps.

[Argument prepared by JOHN S. SWANN.]

AMENDED BILL.

The amended bill (page 45) is filed 13 years after the death of J. D. Young and E. Mays, and 20 years after the original bill was filed, and gives no reason why it was not sooner filed. It is made the basis of the decree complained of.

1. It is barred by time.

2. We note the original bill makes this allegation in regard to 1¾-acre lot here in controversy:

"Your orator further alleges that said conveyances of the "property described in said trust deed, being subsequent to the "execution of the said trust deed, are wholly inoperative and "void, as far as they effect the lien created by same." (Page 5.)

This allegation (as see the deeds Jno. N. Clarkson to T. B. Swann, page 12, and Clarkson's prior deed to Ruffner, page 9,) has reference to these two lots. The first valued at something over two thousand dollars, the other at $9,000, (see the deeds). Suppose this to be true, although we have proven by Jno. N. Clarkson, (see extract from his evidence, page 29,) that all the debts secured in this trust deed except that due

James Clarkson, were paid, and thus, that the debt due James Clarkson not only had priority, but was the only unpaid debt, what right then would trust creditors (excepting James Clarkson,) have under this trust deed? None, whatever; and James Clarkson, in making this released assignment to Swann, which he had the unquestionable right to do, certainly wronged no one, placing Swann in his shoes, &c.; nor did he defraud any general creditors. This being so, there surely can be no liability on this lot to pay Jno. N. Clarkson's creditors on judgments obtained subsequent to the trust deed.

This amended bill is filed for the purpose of segregating the lot sold by Jno. N. Clarkson to Swann, and subjecting *it to debts not named in the trust, nor then in existence*; which we submit, cannot be done. And this amended bill, filed at this remote period, sets up the strange proposition that this release-assignment of this lot, made by James Clarkson to Swann, the vendee of Jno. N. Clarkson, endorsed on Swann's deed from Clarkson, though made in terms in favor of Swann, shall be construed to have been made in favor of Jno. N. Clarkson's subsequent creditors, though James Clarkson had a prior lien, and expressly assigned that lien as to this lot, to Swann.

We have sufficiently answered this.

1. We say this amended bill is barred by time.

2. That no cause has been shown why this amended bill has been now brought forward, 20 years after filing the original bill.

Sto. Eq. Pl., section 886.

1 Edward's Chan. (N. Y.) 46, Verplank v. Mer. In. Co., where all the authorities are cited.

Amendments are not allowed which form the substance, &c.

1 John. Ch. R. 184, Lyon and Rockwell v. Talmage *et als.*

The application to amend must be made as soon as the necessity is discovered.

1 Page, (N. Y.) 424-5; Rogers *et als.*, v. Rogers *et als.*

After witnesses examined, no amendment will be allowed, unless formal, and that under very special circumstances.

6 Page (N. Y.) 47; Bowen *et als.*, v. Idley.

These authorities cited and approved:

17 Howard, 130; Shield *et als.*, v. Barnes.

We note, all the facts set out in this amended bill were known to the plaintiff when the original bill was filed, twenty years before. (See the deeds made part of the original bill.)

This after-thought, called an amended bill, that is brought here thirteen years after Young's death, and twenty years after the original bill was filed, is made a basis for this decree, and has in it no merit.

[Argument prepared by JOHN S. SWANN.]

NOTES ON THE MERITS.

We are to construe the effect of the release made by James Clarkson, beneficiary in the trust deed to Williams, trustee, endorsed on the deed, in favor of T. B. Swann, who got a deed from John N. Clarkson for the 1¾ arces of land in controversy. This deed to Swann is dated August 14th, 1852. (Pages 12 and 13.)

We note that all the personal estate named in the trust deed, perished during the war, (page 12,) and that all the land named was lost to the trust, by superior liens, want of title, &c, (page 13,) leaving no property subject to the trust, except this 1¾ acres in controversy, and the lot which we will call the Jeffries' or Ruffner lot, deeded by John N. Clarkson to Ruffner, (page 8,) and by Ruffner to Jeffries. (Page 10.)

All we know about the value of these two lots is from the deeds. The lot conveyed to Swann, was worth, *prima facie*, at the time, the consideration named, $2,372.92; and so the lot conveyed to Ruffner, and by him to Jeffries, $9,000, at the time John N. Clarkson deeded the lot to Swann, and James Clarkson, the beneficiary in the trust, released to Swann, *in favor of*

Swann, the same day. The debt secured to James Clarkson, by the trust, amounted to a little over $11,000.00, interest added—about the value of the two lots; *and this is somewhat explanatory of the release.*

The debt due James Clarkson, $7,000.00, with interest, had precedence over all the debts named in the trust; all the other debts were paid. (See extract from John N. Clarkson's evidence, page 29.) And the judgments named in the decree complained of are *subsequent to the date of the trust deed, and not set up in the bill.* The debt secured to James Clarkson is admitted every where and known. It is not questioned, and James Clarkson releases his interest, under the trust, in this lot, to T. B. Swann.

We note the decree, here appealed from, subjects this lot, 1¾ acres, to be sold to pay the several judgments named in the decree. We may be allowed to inquire *whether any of these judgments, and if so, how, were proven to exist. They were not proven before Commissioner Fontaine.*

1. They are not, nor is one of them, named in the bill.

2. They have not, nor has one of them, been brought before the court by any plea, answer, petition, nor in any mode known to the rules of pleading.

3. They have not been, nor has one of them been, proven or laid before any master of this court.

4. They have not been, nor was any one of them, proven before any master of the Kanawha court, before the removal of the case to this court.

And we note the first order of reference made by this court in 1873, (pages 22-3,) and the *only* order under which any account was taken, and every subsequent order of re-committal, (and there were four,) required every judgment or other creditor to prove his claim before the master commissioner. *Not one of these judgment creditors, nor any other claimants,* did so. Not one of them ever appeared any where before the court or

master, and yet, in his third and fourth reports, the master reports these judgments.

These reports were re-committed, and the master was directed, among other things, to report on what evidence he had reported these judgments and other claims, and he reports in his fifth and last report, that he reported them on the faith of a paper called a report of Mr. A. T. Laidley, who, he reported in his first report, had no authority to take an account, reporting this so-called account a nullity, (page 25,) which report was not excepted to; and I here call attention to the remarks of Mr. A. T. Laidley, made at the end of this so-called report, (page 21, and amended record pages 8, 9, 10, 11.)

"The case was referred to master commissioner McWhorter, "but he not having time to devote to so laborious an exami- "nation as the case required, some parties in it procured me to "make up the account, and with the * * and assent "of Mr. McWhorter, I have done so; and, with his leave, re- "spectfully submit it, after having retained the report more "than two days before returning it." (Amended record, page 21.)

"ALEXANDER T. LAIDLEY.

"February 19th, 1870."

Is not this account a nullity? Are interests to be determined and property to be sold under such proceeding? Can a court make such proceedings lawful? Can land be sold to satisfy claims ascertained and proven, if you choose, before a private gentleman, without any right or authority to hear proofs or take an account? Is not a master a judicial officer? Can a private gentleman be treated as such, and his account or "*paper*" be treated as a judicial act? It is absurd.

This fifth report was excepted to for this reason by the attorney of Hussey & Co., (amended record, pages 19-22.) The exceptions were overruled. *These defendants had not been made parties; therefore could not except, could not be heard.* And under this so-called bill of revivor, the court decrees a sale

of this property on the faith of claims established in this way, and refuses a hearing to the contestants.

Jno. N. Clarkson's deed to T. B. Swann (page 12,) certainly conveyed to Swann his equitable interest in this lot, and James Clarkson's release (assignment) to Swann (page 12,) as certainly conveyed his interest in this lot under the deed of trust, the legal title remaining in Williams, the trustee; and we might say for James Clarkson: "Shall I not do as I will with mine own?"

Clarkson surely had the right to assign his interest under the trust in this, or any part, or all of the trust property. And this would at least put Swann in his shoes as to the property, and vest him with all his rights under the trust; and if this lot, so assigned to Swann, is to be held liable for Jno. N. Clarkson's debts, and to his general creditors, then if James Clarkson had assigned the *whole, that* would be liable. Such a transaction is of every day occurrence. Therefore Swann, to say the least, is substituted to James Clarkson's equity in this lot, and has a lien under the trust, and can call on the court to enforce it.

Does the release confer on Swann nothing? If it was inoperative, then this lot remains liable, together with the Jeffries or Ruffner lot, to satisfy the James Clarkson trust debt, although this decree segregates it, and subjects it to Jno. N. Clarkson's general creditors, not named in the trust, not named in the bill, not proven to exist. If the release was operative, then surely Swann has James Clarkson's lien on it to the amount at least of the consideration he paid for it, if not of its value.

See 1 John. Ch. R. page 425, Stevens v. Cooper, where it is held:

"Where 6 separate lots or parcels of land were mortgaged, "and the mortgagee afterwards released 4 of the lots from the "mortgage, leaving the original debt to stand charged on the "remaining two, it was held that the lots were chargeable with "their relative proportion only of the original debt and interest.

"according to the relative value of the 6 lots at the date of the "mortgage." But this release to Swann was simply an assignment.

Here we note James Clarkson made this release in favor of Swann, limiting and designating who was to take the benefit of the lien, as he certainly had the right to do, and hence this release was a mere assignment of his interest in this lot to Swann, and therefore there should be an apportionment, at least, which could only be had by reference to a master, &c.

RELEASE—CONSTRUCTION, &c.

In construing this release of James Clarkson to Swann, we must be governed by the *intent*, and the words used will be so construed as to carry out the intent. And it is manifest that the intent of Swann in taking, and of James Clarkson in making the release, was, as far as he had a lien on this lot, to put Swann in his place, and make his title good.

14 Pickering, 374, Hunt v. Hunt, treats the subject exhaustively, and holds:

"That a deed of quit claim and release by a mortgagee for a "pecuniary consideration, &c., conveys the mortgagee's estate. "That a mortgagee conveying to a purchaser of an equity of re-"demption, for a pecuniary consideration, by a deed of quit-"claim and release, &c., &c., passes his estate without merg-"ing or extinguishing the mortgage as against a prior purcha-"ser of the equity of redemption, when such was the manifest "object of the conveyance."

The court says:

"T. had purchased the equity of redemption of L., and then "took the quit-claim deed of V. It was contended that this trans-"action, by operation of law, was a discharge of the mortgage, "and the mortgage became merged in the equity and extin-"guished, so that no title could be claimed under it. The court

"held that this position could not be maintained. That the "purchaser of the equity of redemption, whether of a part or "the whole of the mortgaged premises, was not disabled from "becoming assignee, &c., and that the assignee will stand in place "of the first mortgagee, &c., as against all subsequent claim-"ants." So if they would redeem, they must first pay to him, &c., &c., and that there was no merger, &c.

See, also, 5 Peters, 580; Tierman v. Jackson.

8 Howard, 134; Veasie v. Williams.

9 Ohio, 96; Hall's Lessee v. Ashly.

7 Mass., 381; Pray v. Pierce.

118 Mass., 360; Hall v. Bliss; which holds that a release will be construed to be a conveyance, effectual to pass the estate or interest released, &c., &c., and

An assignee in equity stands absolutely in the place of his assignor, and it is the same as if the contract had been originally made with the assignees. Assignment of the mortgage gives assignees all the estate of the beneficiary.

4 Mun., 382; Chapman v. Armistead.

3 Iredell, N. C. Equity, 347.

26 Grattan, Va., 705; Russel v. Randolph.

This being so, is there any reason why a deed of release, or assignment, &c., by a beneficiary *under a trust* deed to the vendee of the grantor, or to any other person, should not convey to the releasee the beneficary's interest *under the trust?*

A decree of foreclosure may be made in favor of the assignee of a mortgage; why may not a decree of sale under the trust be made in favor of the assignee of the beneficary under the trust?

4 Mun., Va., 382; Chapman v. Armistead.

What matters it whether the release was of one of the tracts or all of the tracts of land named in the trust? That the release was of less than all, would only raise the question of apportionment.

We note that there can be no merger in this transaction, for *the legal estate is yet in the trustee, Williams.* It is not in Swann.

"*The assignment* of debt secured by deed of trust, *transfers* "*the deed* along with the debt secured."

25 Grattan Va., 448; McClintic v. Wise's Adm'r, *et als.*

Even in the case of merger, a court of equity will keep the estate separate, so as to carry out the intention of the person in whom the estates unite, and he will be presumed to intend what is to his interest, (and yet the decree holds the exact reverse.)

111 U. S. R., 738; Factor's Ins. Co., v. Murphy.

SWANN'S EQUITIES.

Manifestly, Jno. W. Clarkson's deed to Swann conveyed to him his equities in this lot of land. What were his equities? We must note all the other debts named in the deed of trust were paid, (see J. N. Clarkson's evidence, extract, p. 29,) and all the other property named in the deed, except this and the Ruffner lot, was lost to the trust. The debt to James Clarkson had precedence, and exceeded at the date of the deed the whole value of these two lots. What were these equities? The surplus that might remain from the sale of these lots, after paying debt to Jas. Clarkson. And this equity his deed transferred to Swann. But the deeds show the debt was greater at the time than the value of the two lots combined, and the release specifies that it was made in favor of Swann, who surely got James Clarkson's interest in the lot, and Swann paid for the lot its value, and hence Swann has the right to hold the lot as James Clarkson's assignee, for what he paid. In other words, he takes James Clarkson's shoes as to this lot. Its value was (see the deed to Swann,) $2,372.92. The value of the Jeffries or Ruffner lot, $9,000.

The debt secured to James Clarkson, and the only subsisting lien on these lots, was, at the time of this release or assignment and this deed from J. N. Clarkson to Swann, about $11,000; so that this release transferred to Swann a fair pro rata part of the land covered by this deed of trust to secure this debt; the land being worth, that is, the two lots, $11,000, and the debt

about the same,—this lot being worth $2,372, and the Jeffries lot $9,000,—and this throws light on the intention to some extent.

1 John. Ch., (cited above,) 425; Stevens v. Cooper.

And this pro rata could only be ascertained by reference to a master.

But the court, by this decree, holds that the legal and equitable estate have united in Swann. (How can this be, when the legal title is still in the trustee?) That James Clarkson's release (assignment) to Swann, though made in terms in favor of Swann, confers nothing on Swann; but is to be virtually construed a release in favor of John N. Clarkson's general creditors, (and they not named in the trust deed, nor in existence when it was executed,) and that James Clarkson, the beneficiary in the trust deed, cannot assign his interest in part, or in whole; and this part of the real estate, the 1¾ acre lot, pledged by the trust to pay this debt to James Clarkson, is to be *segregated*, considered and treated as Jno. N. Clarkson's property, disencumbered of the trust, and sold to satisfy his general creditors.

RENTS.

The court makes the further extraordinary decree that in this creditor's suit, rents, *prior* to the decree, are to be charged to Swann and his vendees. This is not law.

2 Grattan, (Va.,) 420; Leake v. Ferguson.

And the grantor, in a deed of trust, in possession, is not liable for rents; neither is his grantee. He cannot be made liable both for rents and interests, but only for interest on his debt, and for this interest the land is bound.

As these defendants have never been before this court, since the death of John D. Young—until some fourteen years after his death, (see date of the amended bill of revivor, May, 1885, p. 49); and after all these five accounts, taken on five re-committals, and after all the various decretal orders, surely the court might

at least have made an order of reference after they are brought before the court, giving them the poor privilege of disputing these judgments and accounts, the manner of taking, and meeting their enemies face to face, and have some sort of show for a hearing. *This, the decree denies them.*

To judge a man without hearing him is very extraordinary, and contrary to the decisions of the Supreme Court in many cases.

OBJECTION TO THE JURISDICTION OF THIS COURT.

Have not the defendants the right now to object to the jurisdiction of this court, when brought in under this bill of revivor, or in any other way, and to show that this whole thing has been carried on by a court that had no jurisdiction?

THE REMOVAL OF THIS CAUSE ILLEGAL UNDER THE ACT OF 1867.

The papers show that the case settled by the decree was wholly between citizens of this State. Therefore the court had no jurisdiction.

18 Wallace, 553; Sewing Machine Co.
117 U. S. R., 280; Freidley Ins. Co. v. Huntington.
100 U. S. R., 457; Meyer v. Construction Co.
101 U. S. R., 289; Pacific R. R. Co. v. Ketchum.

The court will notice want of jurisdiction.
7 Wallace, 618.
23 Wallace, 666.

[Argument prepared by JOHN S. SWANN.]

J Swann

Solicitor for Appellants

[No. 342—October Term, 1888.]

SUPREME COURT

— OF THE —

UNITED STATES.

L. N. YOUNG, ET ALS., Appellants,

vs.

E. B. KNIGHT, ADM'R OF M. PARKER, Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF WEST VIRGINIA.

Brief of Appellants in Reply to Motion to Dismiss, made severally by Francis Thompson, Putney & Norton, E. B. Knight, Adm'r of M. Parker, J. H. Brown, E. B. Knight, Adm'r of M. Parker, dec'd, and Hedrick for M. Parker, dec'd, Babbett, Good & Co., and R. E. Putney, Jr., & Co., and others.

Solicitor for Appellants.

CHARLESTON:
W. L. MOORE, PRINTER.
1889.

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We notice a preliminary question: The right to be heard, which has been denied to the appellants, &c., in the matter of jurisdiction, &c.

The appellants have not had an opportunity to appear in this cause, to show their rights or to contest the claims of the

AMOUNT OR VALUE IN CONTROVERSY.

Our appeal is met with a motion to dismiss. What is the controversy about? Why, about the ownership of this lot of 1¾ acres, worth over $5,000, as see the certified copies of the affidavits filed when the court allowed the appeal. What was the object of this so-called bill of revivor? Why, to get the court to say that this lot was the property of John N. Clarkson and therefore liable to his general creditors—to hold for naught the deed from John N. Clarkson to Swann and the assignment by James Clarkson of his equitable rights in it to Swann—to hold for naught the deed from Swann to Mays, and from Mays to Young, and the title derived from Young by his heirs and vendees.

We note the appellants set up counter claims. They, in their answers, petitions, &c., ask for affirmative relief in this—they ask to be substituted to the equitable rights of James Clarkson in the trust deed of August, 1852, which exceeds $5,000—exclusive of interest and costs against this lot now decreed to be sold to pay the general creditors of John N. Clarkson.

The James Clarkson trust and his lien on this 1¾-acre lot ought to have been adjudicated. It is the first lien and the decree is silent about it. After the lot is sold, and the proceeds distributed, there will be no use in adjudicating this claim—and moreover it would be sold under this cloud.

The subject of this controversy, the gist of the litigation, is not the amount of the judgments of the appellees v. John N. Clarkson, for that is not in dispute.

The question here involved is the ownership of this 1¾-acre lot and its value, worth over $5,000, as see the answer of T. B. Swann (page 39,) and the five affidavits, certified copies of which are filed. (These affidavits are the basis of the decree allowing this appeal and certifying the controversy at over $5,000.)

Certified copies of five of the affidavits, as to the value of this lot, taken at the time the decree was made, are filed herewith, each in these words :

"PARKER'S ADM'R
vs.
CLARKSON AND OTHERS, } IN CHANCERY.

"This day, John Slack, Jr., I. H. Snyder, severally came before me and made oath that the house and lot in controversy in this suit, sold by Mays to Young, is worth over $5,000.

"JOHN SLACK, JR.,
"I. H. SNYDER.

"Taken, sworn to and subscribed severally by the affiants hereto, before me this 12th December, 1885.

"JASPER Y. MOORE, *Clerk*
"*D. C. U. S., D. W. Va.*

"A Copy—Teste :

"JASPER Y. MOORE, *Clerk*
"*D. C. U. S., D. W. Va.*"

"M. PARKER'S ADM'R
vs.
CLARKSON AND OTHERS. } IN CHANCERY.

"This day M. W. Young made oath before me, and affirms that the house and lot in *contovy* in this suit, sold by E. Mays, to J. D. Young is worth over five thousand dollars.

"M. W. YOUNG.

"*Takin, sworn* to and subscribed before me this 12 *dy of Drr*, 1885.

"JASPER Y. MOORE, Clerk,
"*D. C. U. S., D. W. Va.*

"A Copy—Teste :

"JASPER Y. MOORE, Clerk,
"*D. C. U. S., D. W. Va.*"

"M. PARKER'S ADM'R
vs.
CLARKSON AND OTHERS. } IN CHANCERY.

"This day H. L. Gebhart made oath before me and affirms that the house and lot in *contovy* in this suit, sold by E. W. Mays to J. D. Young, near the jail on Virginia street, Charleston, is worth over ($5,000) five thousand dollars.

"H. L. GEBHART.

"Taken, sworn to and subscribed before me this *Dec.* 12, 1885.

"JASPER Y. MOORE, Clerk,
"*D. C. U. S., D. W. Va.*

"A Copy—Teste:

"JASPER Y. MOORE, Clerk,
"*D. C. U. S., D. W. Va.*"

"PARKER'S ADM'R
vs.
CLARKSON AND OTHERS. } IN CHANCERY.

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"JOHN SLACK, Jr.,
"*J.* H. SNYDER.

"Taken, sworn to and subscribed *sevely* by the affiants hereto before me this 12 *Dec.*, 1885.

"JASPER Y. MOORE, Clerk,
"*D. C. U. S., D. W. Va.*

"A Copy—Teste:

"JASPER Y. MOORE, Clerk,
"*D. C. U. S., D. W. Va.*"

"E. B. KNIGHT, Adm'r of M. Parker, dec'd,
vs.
JOHN N. CLARKSON AND OTHERS. } IN CHANCERY.

"This day J. M. Young made oath and affirms that the house and lot in controversy in this suit, sold to his father, John D. Young by E. Mays, is worth over five thousand dollars.

"J. M. YOUNG.

"Taken, sworn to and subscribed before me this 12 day of *Dr.*, 1885.

"JASPER Y. MOORE, Clerk,
"*D. C. U. S., D. W. Va.*

"A Copy—Teste:

"JASPER Y. MOORE, Clerk,
"*D. C. U. S., D. W. Va.*"

"I, Jasper Y. Moore, Clerk of the District Court of the United States for the District of West Virginia, do certify that the foregoing copies are true copies of affidavits filed in the chancery cause of E. B. Knight, adm'r, &c., v. John N. Clarkson and others, lately pending in my said court at Charleston, on the 12th day of December, 1885.

"In testimony whereof, I hereto subscribe my name and affix the seal of said Court, at Charleston, this 19th day of April, A. D. 1889, and of the Independence of the United States of America the 113th.

L.S.

Teste:

"JASPER Y. MOORE, *Clerk*
"*D. C. U. S., D. W. Va.*"

In whom is the legal title of this lot? In the trustee Williams, or in Jno. N. Clarkson? If in the latter, it is subject to these judgments of the appellees after satisfying the

trusts in favor of James Clarkson. In whom is the equitable title? In James Clarkson, the beneficiary, whose trust debt alone remains unpaid, or in Swann, his releasee (assignee) and the other appellants who hold under him? Upon these questions rests the gist of the decree, for the decree holds the legal title to be in Jno. N. Clarkson, and holds that neither James Clarkson nor his assignee Swann, nor the Youngs, purchasers, &c., have any equity in the lot. We appeal from the judgment of the court *on this issue*, the subject of the matter of the appeal being the ownership of this lot. Hence, the amounts of the judgments in favor of the appellees is foreign to the real issue. The court holds that James Clarkson's assignment to Swann destroyed his equity under the trust. We say it transferred it to Swann. Therefore, the matter of the judgments of the appellees is collateral, so to speak.

This is of the class of cases cited in Gibson v. Shufet 122 U. S. 27; Freeman v. Dawson, 110 U. S. 264; Market Co. v. Hoffman, 101 U. S. 112; and almost identical with Estes v. Gunter, 121 U. S. 183.

COUNTER CLAIMS.

Moreover, there are counter claims to this 1¾-acre lot. See answer of R. W. Clarkson, administrator, &c., (record, p. 17), of T. B. Swann (pp. 38 and 43), petition of M. W. Young (46), plea of T. B. Swann (53—55), of J. M. Young (54), answer of Swann to Amended Bill (56), of Young (58), and the two petitions of the Youngs (58 and 64), and order filing petition of M. W. Young for bill of review at same term of the decree, (amended record p. 4), and we note this bill of review is yet pending.

In this class of cases we cite Henderson v. Wadsworth, 15 U. S. on page 276, and cases there cited, and Hilton v. Dickenson, 108 U. S. 165, and, as we think, the decisive case of *Estes v. Gunter*, 121 *U. S.*, 183.

This suit was brought to enforce this trust deed, among other things to enforce the payment of James Clarkson's trust lien on this 1¾ acres, worth over $5,000, and the lot sold to Ruffner (p. 10), worth about $8,000, the debt now being over $20,000. If the release, James Clarkson to Swann, passed nothing, and so this decree says, then his lien remains. This is the controversy between James Clarkson's heirs and the appellants and the other parties in interest, and the controversy in this regard about the ownership of this 1¾-acre lot is not adjudicated by the decree.

For if James Clarkson's release did not pass his *pro rata* interest under the trust to Swann, then his lien remains. If it did, then there is error in the decree, which says it did not, and this is the gist of this appeal, thus making this lot liable for judgment against John N. Clarkson before adjudicating the rights of James Clarkson under the trust, and the *pro tanto* liability of the two lots. What has this to do with the amounts, several or aggregate, of the judgments of the appellees? Hence, the controversy is about the ownership of this 1¾-acre lot.

To sell this 1¾-acre lot under this decree, would be to sell it without settling these conflicting claims, and before adjudicating the questions arising under the bill of review now pending. (Amended record p. 4.) *We had to appeal to prevent the sale.*

Could we apply for a mandamus to compel the court to pass upon the bill of review?

SECOND OBJECTION

Is to the form of the bond. The bond is formal; if not so, or if defective, or if no bond were given, the court will retain the case with leave to give a better bond. The bond is the work of the clerk.

Austin, Banks & Co. v. B. R. R. Co., 23 Howard 1; New

Orleans In. Co. v. Albro Co., 112 U. S. 506; 1 Ran. Va., 462.

CITATION.

The appeal is granted on the face of the decree, specifying the value in controversy to be over $5,000. The parties in interest appear on the face of the decree. No citation is needed—if any error in citation, court will retain case to correct it, &c. We see no error in either objection.

This is shown by the case cited in appellees' motion: Estis v. Trabue, 128 U. S. 225.

[Notes prepared by JOHN S. SWANN.]

Solicitor for Appellants.

Office Supreme Court U. S.
FILED.
APR 18 1889
JAMES. H. McKENNEY,
CLERK.

[No. 342—October Term, 1888.]

SUPREME COURT

— OF THE —

UNITED STATES.

L. N. YOUNG, et als., Appellants,

vs.

EDWARD B. KNIGHT, Adm'r, Appellee.

the General

NOTICE AND BRIEF FOR APPELLEES

upon the Motion to dismiss the Appeal in the above cause

S. A. MILLER & J. F. BROWN,
Counsellors for Appellee.

CHARLESTON:
W. L. MOORE, PRINTER.
1889.

SUPREME COURT

— OF THE —

UNITED STATES.

[No. 342—October Term, 1888.]

L. N. YOUNG, M. W. YOUNG, J. M. YOUNG, H. SLACK and A. DIX, Heirs at Law of John D. Young, Dec'd, J. N. CLARKSON and THOMAS B. SWANN, Appellants,

vs.

EDWARD B. KNIGHT, Administrator of Milton Parker, Dec'd, Appellee.

Appeal from the District Court of the United States, for the District of West Virginia.

The appellants in the above entitled cause, now pending, will, and each and every of them will, take notice that on the ——— day of ———————, 1889, during the October term of 1888, the undersigned, appellee in said cause, will move said Supreme Court to dismiss the appeal heretofore allowed in said cause by the District Court of the

United States, holden at Charleston, for the district of West Virginia, on the 12th day of December, 1885, for the following causes and reasons:

1. For want of jurisdiction; because the amount in dispute between the undersigned appellee and the appellants did not exceed five thousand dollars ($5,000), and was not sufficient to sustain the appeal in this cause; the amount decreed to this appellee, being $, with interest from

2. Because no sufficient bond, as required by the said decree of 12th December, 1885, and the laws governing such bonds, has been given, acknowledged and received and approved in the cause.

3. That no sufficient appeal has been allowed by the said District Court, carried into effect and now exists, as to the undersigned appellee.

4. And for other causes and reasons appearing and manifest upon the face of the proceedings, as shown by the transcript of the record filed in this cause.

For all which, the undersigned appellee, moves said Honorable Supreme Court of the United States, to dismiss said appeal, as to him or them, with such order as may be just, and according to the principles which govern courts of equity, and may be required by the laws of the United States, and the rules of this Honorable Court made under the same.

.....

Appellee.

By S. A. MILLER & J. F. BROWN,
Counsellors for said Appellee.

CHARLESTON, W. VA., April 3d, 1889.

BRIEF WITH NOTICE, AND FILED ON MOTION TO COURT.

First. Jurisdiction: Decisions so numerous as to grieve the labor of research.

Stewart and others v. Dunham and others, 115 U. S., 61.

Henderson, Ex'r, v. Wadsworth; Howard L. Henderson v. same; Warren W. Henderson v. same; McCarthy and another v. same, 115 U. S., 264.

Hassall, Trustee, v. Wilcox and others, 115 U. S., 598.

Gibson v. Shufeldt, 122 U. S., 27.

The principle is clearly established, that under the Act of February 16th, 1875, (Rev. Statutes, Supplement, p. 136,) that the appeal or writ of error allowed must, as against appellant or appellee, made in favor of either, "exceed the sum of $5,000, exclusive of costs."

Cogswell and others v. Fordyce, decided November 19th, 1888, 128 U. S., 391.

Pacific Postal Tel. Co. v. O'Connor, decided November 19th, 1888, 128 U. S., 394.

Second. Cause: No bond.

The bond required by the District Court of the United States, allowing the appeal, is payable to R. E. Putney, Jun., & Co., and others. This is certainly not sufficient according to the rules and practice of the courts.

It is too indefinite.

It must be payable to the parties against whom the citation is sued out, or against whom the appeal is allowed. No one appears on record except E. B. Knight, administrator of Milton Parker, dec'd.

Bigler v. Waller, 12 Wall., 142.

Dapenport v. Fletcher, 16 How. 142.

A certified copy of the bond given, is as follows:

"BOND.

"KNOW ALL MEN BY THESE PRESENTS:

"That we, Thomas B. Swann and John S. Swann are held and firmly bound unto R. E Putney, Jun., & Co., and others, in the just and full sum of Five Thousand Dollars, to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this 12th day of December, 1885.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH,

That whereas, L. N. Young, M. W. Young, J. M. Young, H. Slack, A. Dix, heirs at law of J. D. Young, J. N. Clarkson and Thomas B. Swann have obtained from the Judge of the District Court of the United States for the District of West Virginia, an appeal to the Supreme Court of the United States of America, from the decree entered in the chancery cause of Milton Parker's administrator against John N. Clarkson and others, on the 12th day of December, A. D. 1885.

"Now, therefore, if the said L. N. Young, M. W. Young, J. M. Young, H. Slack, A. Dix, heirs at law of J. D. Young, J. N. Clarkson and Thomas B. Swann, shall prosecute their said appeal with effect, and shall pay all costs and damages in case said decree be affirmed, then this obligation to be void, else to remain in full force.

"T. B. SWANN, [SEAL.]
"JNO. S. SWANN, [SEAL.]"

"Acknowledged before me and approved.

"J. J. JACKSON,
"*Judge D. C. U. S., D. W. Va.*"

"I, Jasper Y. Moore, Clerk of the District Court of the United States for the District of West Virginia, do hereby

certify that the foregoing is a true and correct copy of the Appeal Bond in the chancery cause of Milton Parker's administrator against John N. Clarkson and others, bearing date the 12th day of December, 1885, and now on file in my office, at Charleston.

"In testimony whereof, I hereto set my hand and affix the seal of said Court, at Charleston, in said District, this 5th day of April, A. D. 1889, and in the 113th year of the Independence of the United States of America.

L.S.

"JASPER Y. MOORE, *Clerk*
"*D. C. U. S., D. W. Va.*"

Third. Cause:

There was no citation sued out or issued on this appeal, and there is no mention in the bond of the appellees, but R. E. Putney, Jun., & Co., and others; and the transcript of the record shows no appellee, but E. B. Knight, administrator and appellee; hence he is the only appellee.

Estis v. Trabue, 128 U. S., 225.

S. A. MILLER & J. F. BROWN,
Counsellors for said Appellee.

[No. 342—October Term, 1888.]

SUPREME COURT

— OF THE —

UNITED STATES.

L. N. YOUNG, ET ALS., Appellants,

vs.

E. B. KNIGHT, ADM'R OF M. PARKER, Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF WEST VIRGINIA.

Brief of Appellants in Reply to Motion to Dismiss, made severally by Francis Thompson, Putney & Norton, E. B. Knight, Adm'r of M. Parker, J. H. Brown, E. B. Knight, Adm'r of M. Parker, dec'd, and Hedrick for M. Parker, dec'd, Babbett, Good & Co., and R. E. Putney, Jr., & Co., and others.

Solicitor for Appellants.

CHARLESTON:
W. L. MOORE, PRINTER.

1889.

SUPREME COURT

— OF THE —

UNITED STATES.

[No. 342—October Term, 1888.]

L. N. YOUNG, et als., Appellants,

vs.

E. B. KNIGHT, Adm'r of M. Parker, Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF WEST VIRGINIA.

Brief of Appellants in Reply to Motion to Dismiss, made severally by Francis Thompson, Putney & Norton, E. B. Knight, Adm'r of M. Parker, J. H. Brown, E. B. Knight, Adm'r of M. Parker, dec'd, and Hedrick for M. Parker, dec'd, Babbett, Good & Co., and R. E. Putney, Jr., & Co., and others.

We notice a preliminary question: The right to be heard, which has been denied to the appellants, &c., in the matter of jurisdiction, &c.

The appellants have not had an opportunity to appear in this cause, to show their rights or to contest the claims of the

appellees. Neither has the Administrator of James Clarkson, benificiary in the trust. The Supreme Court of the United States, and all courts, hold that a judgment, or decree, or order, &c., taken or made against a citizen, without giving him an opportunity to be heard by *due and rightful* process of law, will be held for naught, &c.

Windsor v. McVeigh, 93 U. S, 274; U. S. v. McVeigh, 11 Wal., 259.

We refer to our brief, pages two to seven, inclusive, by which it will appear that this suit abated—was suspended, as to the appellants, by the death of Mays and J. D. Young, in 1872; and per consequence, as to Swann, as see Neal v. Hawthorp, 3 Bland. Ch. (Md. R.) 551, and that *nothing* was done in the cause as to any party in interest, and that no evidence was taken before any commissioner, until after the abatement, and in the interval between *then* and the filing of the bill of revivor, some twelve years thereafter, in 1883, &c., during the suspension of the suit as to the appellants, and of any lawful proceedings as to them; and, moreover, that not one of the appellees ever asserted his claim before the commissioner, or elsewhere. So these appellants were not in court by any process of law, and could not and did not have an opportunity to defend their rights to this 1¾-acres of land, worth over $5,000, as proven and so certified in the decree on the strength of affidavits, certified copies of which are herewith filed, and (see Swann's answer,) they have not been heard, nor have they been given an opportunity to be heard; and this decree, taking from them this property, is based on proceedings had while the suit was suspended as to them, and therefore void. And even if the bill of revivor was not too late, the court should have recommitted the case so as to give the appellants an opportunity to defend their rights. Even this was refused them, contrary to the plain provisions of the Constitution of the United States: "No "person shall be deprived of life, liberty or property, without "due process of law. Nor shall any State deprive any per-

" son of life, liberty or property, without due process of law." Article 5 and 14, Amendment of the Constitution.

By what process known to the law have the judgments of these appellees been established and decreed against this lot, which, on the face of the papers, is owned by the appellants, the Youngs, and has been in their possession since 1858, with title unquestioned, until the filing of this bill of revivor in 1883? What opportunity has been given them to defend their ownership? What has the value of the property to do with so grave a question?

There is an act of congress, 14 sub-division, revised statutes, section 699, referred to in Cogswell v. Fordyce, 128 U. S., 391, which gives jurisdiction where the citizen's right to be heard has been disregarded. Surely every citizen has the *right and privilege* to be heard in defense of his right of property, and certain it is that he cannot be heard after an abatement—suspension against his ancestor, devisor or vendor, until the suit is revived—put in motion again against him by due process of law—that is the rules of pleadings; nor can his rights be adjudicated by anything done in the suit, during such suspension. We respectfully submit this right was already secured to the citizen before this section 699, by the constitution of the U. S., and of every State, and by the law of every civilized nation.

Again, the constitution of W. Va., article 11, section 6: "No person in time of peace shall be deprived of life, liberty, 'or property without due process of law."

This supreme Court, even were the constitution of the U. S. silent on this subject, would see to it that this right of a citizen of this State should not be violated by a subordinate court of the U. S., regardless of the insignificance of the person, or of the matter in controversy. More especially in a case unlawfully removed to the U. S. District Court and adjudicated there without giving these appellants an *opportunity to contest the right of removal.*

AMOUNT OR VALUE IN CONTROVERSY.

Our appeal is met with a motion to dismiss. What is the controversy about? Why, about the ownership of this lot of 1¾ acres, worth over $5,000, as see the certified copies of the affidavits filed when the court allowed the appeal. What was the object of this so-called bill of revivor? Why, to get the court to say that this lot was the property of John N. Clarkson and therefore liable to his general creditors—to hold for naught the deed from John N. Clarkson to Swann and the assignment by James Clarkson of his equitable rights in it to Swann—to hold for naught the deed from Swann to Mays, and from Mays to Young, and the title derived from Young by his heirs and vendees.

We note the appellants set up counter claims. They, in their answers, petitions, &c., ask for affirmative relief in this—they ask to be substituted to the equitable rights of James Clarkson in the trust deed of August, 1852, which exceeds $5,000—exclusive of interest and costs against this lot now decreed to be sold to pay the general creditors of John N. Clarkson.

The James Clarkson trust and his lien on this 1¾-acre lot ought to have been adjudicated. It is the first lien and the decree is silent about it. After the lot is sold, and the proceeds distributed, there will be no use in adjudicating this claim—and moreover it would be sold under this cloud.

The subject of this controversy, the gist of the litigation, is not the amount of the judgments of the appellees v. John N. Clarkson, for that is not in dispute.

The question here involved is the ownership of this 1¾-acre lot and its value, worth over $5,000, as see the answer of T. B. Swann (page 39,) and the five affidavits, certified copies of which are filed. (These affidavits are the basis of the decree allowing this appeal and certifying the controversy at over $5,000.)

Certified copies of five of the affidavits, as to the value of this lot, taken at the time the decree was made, are filed herewith, each in these words :

"PARKER'S ADM'R
vs.
CLARKSON AND OTHERS, } IN CHANCERY.

"This day, John Slack, Jr., I. H. Snyder, severally came before me and made oath that the house and lot in controversy in this suit, sold by Mays to Young, is worth over $5,000.

"JOHN SLACK, JR.,
"I. H. SNYDER.

"Taken, sworn to and subscribed severally by the affiants hereto, before me this 12th December, 1885.

"JASPER Y. MOORE, *Clerk*
"*D. C. U. S., D. W. Va.*

"A Copy—Teste :

"JASPER Y. MOORE, *Clerk*
"*D. C. U. S., D. W. Va.*"

"M. PARKER'S ADM'R
vs.
CLARKSON AND OTHERS. } IN CHANCERY.

"This day M. W. Young made oath before me, and affirms that the house and lot in *contovy* in this suit, sold by E. Mays, to J. D. Young is worth over five thousand dollars.

"M. W. YOUNG.

"*Takin, sworn* to and subscribed before me this 12 *dy of Drr,* 1885.

"JASPER Y. MOORE, Clerk,
"*D. C. U. S., D. W. Va.*

"A Copy—Teste :

"JASPER Y. MOORE, Clerk,
"*D. C. U. S., D. W. Va.*"

"M. PARKER'S ADM'R
vs.
CLARKSON AND OTHERS. } IN CHANCERY.

"This day H. L. Gebhart made oath before me and affirms that the house and lot in *contovy* in this suit, sold by E. W. Mays to J. D. Young, near the jail on Virginia street, Charleston, is worth over ($5,000) five thousand dollars.

"H. L. GEBHART.

"Taken, sworn to and subscribed before me this *Dec.* 12, 1885.

"JASPER Y. MOORE, Clerk,
"*D. C. U. S., D. W. Va.*

"A Copy—Teste:

"JASPER Y. MOORE, Clerk,
"*D. C. U. S., D. W. Va.*"

"PARKER'S ADM'R
vs.
CLARKSON AND OTHERS. } IN CHANCERY.

"This day John Slack, Jr., and *J.* H. Snyder severally came before me and made oath that the house and lot in *contrsy in* this suit, *sld by* Mays to Young, is worth over $5,000.

"JOHN SLACK, Jr.,
"*J.* H. SNYDER.

"Taken, sworn to and subscribed *sevely* by the affiants hereto before me this 12 *Dec.*, 1885.

"JASPER Y. MOORE, Clerk,
"*D. C. U. S., D. W. Va.*

"A Copy—Teste:

"JASPER Y. MOORE, Clerk,
"*D. C. U. S., D. W. Va.*"

"E. B. KNIGHT, Adm'r of M. Parker, dec'd,
vs.
JOHN N. CLARKSON AND OTHERS. } IN CHANCERY.

"This day J. M. Young made oath and affirms that the house and lot in controversy in this suit, sold to his father, John D. Young by E. Mays, is worth over five thousand dollars.

"J. M. YOUNG.

"Taken, sworn to and subscribed before me this 12 day of *Dr.*, 1885.

"JASPER Y. MOORE, Clerk,
"*D. C. U. S., D. W. Va.*

"A Copy—Teste :

"JASPER Y. MOORE, Clerk,
"*D. C. U. S., D. W. Va.*"

"I, Jasper Y. Moore, Clerk of the District Court of the United States for the District of West Virginia, do certify that the foregoing copies are true copies of affidavits filed in the chancery cause of E. B. Knight, adm'r, &c., v. John N. Clarkson and others, lately pending in my said court at Charleston, on the 12th day of December, 1885.

" In testimony whereof, I hereto subscribe my name and affix the seal of said Court, at Charleston, this 19th day of April, A. D. 1889, and of the Independence of the United States of America the 113th.

L.S.

Teste :

"JASPER Y. MOORE, *Clerk*
" *D. C. U. S., D. W. Va.*"

In whom is the legal title of this lot? In the trustee Williams, or in Jno. N. Clarkson? If in the latter, it is subject to these judgments of the appellees after satisfying the

trusts in favor of James Clarkson. In whom is the equitable title? In James Clarkson, the beneficiary, whose trust debt alone remains unpaid, or in Swann, his releasee (assignee) and the other appellants who hold under him? Upon these questions rests the gist of the decree, for the decree holds the legal title to be in Jno. N. Clarkson, and holds that neither James Clarkson nor his assignee Swann, nor the Youngs, purchasers, &c., have any equity in the lot. We appeal from the judgment of the court *on this issue*, the subject of the matter of the appeal being the ownership of this lot. Hence, the amounts of the judgments in favor of the appellees is foreign to the real issue. The court holds that James Clarkson's assignment to Swann destroyed his equity under the trust. We say it transferred it to Swann. Therefore, the matter of the judgments of the appellees is collateral, so to speak.

This is of the class of cases cited in Gibson v. Shufet 122 U. S. 27; Freeman v. Dawson, 110 U. S. 264; Market Co. v. Hoffman, 101 U. S. 112; and almost identical with Estes v. Gunter, 121 U. S. 183.

COUNTER CLAIMS.

Moreover, there are counter claims to this 1¾-acre lot. See answer of R. W. Clarkson, administrator, &c., (record, p. 17), of T. B. Swann (pp. 38 and 43), petition of M. W. Young (46), plea of T. B. Swann (53—55), of J. M. Young (54), answer of Swann to Amended Bill (56), of Young (58), and the two petitions of the Youngs (58 and 64), and order filing petition of M. W. Young for bill of review at same term of the decree, (amended record p. 4), and we note this bill of review is yet pending.

In this class of cases we cite Henderson v. Wadsworth, 15 U. S. on page 276, and cases there cited, and Hilton v. Dickenson, 108 U. S. 165, and, as we think, the decisive case of *Estes v. Gunter*, 121 *U. S.*, 183.

T. B. Swann
Atty for Appellants

Office Supreme Court U. S.
FILED.
OCT 26 1889
JAMES H. McKENNEY
CLERK.

[No. 75—October Term, 1889.]

Supreme Court of the United States.

L. N. YOUNG, et als., Appellants,

vs.

EDWARD B. KNIGHT, Adm'r, Appellee.

BRIEF FOR APPELLEES.

S. A. MILLER & J. F. BROWN,
Counsellors for Appelles.

MOORE'S PRINTING OFFICE, CHARLESTON, W. VA.

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SUPREME COURT

— OF THE —

UNITED STATES.

[No. 75—October Term, 1889.]

L. N. YOUNG, M. W. YOUNG, J. M. YOUNG, H. SLACK and A. DIX, Heirs at Law of John D. Young, Dec'd, J. N. CLARKSON and THOMAS B. SWANN, Appellants.

vs.

EDWARD B. KNIGHT, Administrator of Milton Parker, Dec'd, Appellee.

Appeal from the District Court of the United States, for the District of West Virginia.

REASONS FOR DISMISSING APPEAL.

1. For want of jurisdiction; because the amount in dispute between each of the undersigned appellees and the appellants did not exceed five thousand dollars ($5,000), and was not sufficient to sustain the appeal in this cause; the amount decreed to the appellees, being:

Babbitt, Goode & Co.,	$ 654 10
Putney & Norton,	633 97

R. E. Putney, Jr. & Co.,	3075 20
Francis Thompson,	2211 62
Francis Thompson,	2224 42
J. H. Brown,	821 91
J. H. Brown,	716 57
J. H. Brown,	827 82
J. H. Brown,	979 79
J. H. Brown,	529 76
J. H. Brown,	3982 44
Hedrick, for Milton Parker,	967 18
Milton Parker,	1233 75

With interest upon all and each, from the 18th day of October, 1878, until paid.

2. Because no sufficient bond, as required by the said decree of 12 December, 1885, and the laws governing such bonds, has been given, acknowledged and received and approved in the cause.

3. That no sufficient appeal has been allowed by the said District Court, carried into effect and now exists, as to any of the undersigned appellees, except E. B. Knight, administrator, &c., the others appearing here as appellees under protest.

4. Because much of the material part of the record has not been printed.

5. And for other causes and reasons appearing and manifest upon the face of the proceedings, as shown by the transcript of the record filed in this cause.

For all which, the undersigned appellees will move said Hon. Supreme Court of the United States, to dismiss said appeal, as to each of them, with such order as may be just, and according to the principles which govern courts of equity, and may be required by the laws of the United States, and the rules of this Honorable Court made under the same.

BRIEF AS TO DISMISSAL OF APPEAL.

First. Jurisdiction: Decisions so numerous as to grieve the labor of research.

Stewart and others v. Dunham and others, 115 U. S., 61.

Henderson Ex'r v. Wadsworth; Howard L. Henderson v. same; Warren W. Henderson v. same; McCarthy and another v. same, 115 U. S., 264.

Hassall, Trustee, v. Wilcox and others, 115 U. S., 598.

Gibson v. Shufeldt, 122 U. S., 27.

Richardson v. Green, 130 U. S., 104.

The principle is clearly established, that under the Act of February 16th, 1875, (Rev. Statutes, Supplement, p. 136,) the appeal or writ of error allowed must, as against appellant or appellee, made in favor of either, "exceed the sum of $5,000, exclusive of costs."

Cogswell and others v. Fordyce, decided November 19th, 1888, 128 U. S., 391.

Pacific Postal Tel. Co. v. O'Connor, decided November 19th, 1888, 128 U. S., 394.

The suit is not for the land, but that it is liable for the judgment liens upon it, when J. D. Young acquired posession. It is immaterial what is the value of the land. The sole question is the amount of each of the debts decreed against it. Each debt stands by itself; they cannot be aggregated on a question of jurisdiction.

Redfield v. Parks, 130 U. S., 623.

Richardson v. Green, 130 U. S., 104.

Second Cause: No bond.

The bond required by the District Court of the United States, allowing the appeal, is payable to R. E. Putney, Jun., & Co., and others. This is certainly not sufficient according to the rules and practice of the courts.

It is too indefinite.

It must be payable to the parties against whom the citation

is sued out, or against whom the appeal is allowed. No one appears on record except E. B. Knight, administrator of Milton Parker, dec'd.

Bigler v. Waller, 12 Wall., 142.

Dapenport v. Fletcher, 16 How., 142.

A certified copy of the bond given, is as follows:

"BOND.

"KNOW ALL MEN BY THESE PRESENTS:

"That we, Thomas B. Swann and John S. Swann are held and firmly bound unto R. E. Putney, Jun., & Co., and others, in the just and full sum of Five Thousand Dollars, to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally, firmly by these presents, sealed with our seals, and dated this 12th, day of December, 1885.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH,

That whereas, L. N. Young, M. W. Young, J. M. Young, H. Slack, A. Dix, heirs at law of J. D. Young, J. N. Clarkson and Thomas B. Swann, have obtained from the Judge of the District Court of the United States for the District of West Virginia, an appeal to the Supreme Court of the United States of America, from the decree entered in the chancery cause of Milton Parker's administrator against John N. Clarkson and others, on the 12th day of December, A. D. 1885.

"Now, therefore, if the said L. N. Young, M. W. Young, J. M. Young, H. Slack, A. Dix, heirs at law of J. D. Young, J. N. Clarkson and Thomas B. Swann, shall prosecute their said appeal with effect, and shall pay all costs and damages in case said decree be affirmed, then this obligation to be void, else to remain in full force.

"T. B. SWANN, [SEAL.]
"JNO. S. SWANN, [SEAL.]"

"Acknowledged before me and approved.

"J. J. JACKSON,
"*Judge D. C. U. S., D. W. Va.*"

"I, Jasper Y. Moore, Clerk of the District Court of the United States for the District of West Virginia, do hereby certify that the foregoing is a true and correct copy of the Appeal Bond in the chancery cause of Milton Parker's administrator against John N. Clarkson and others, bearing date the 12th day of December, 1885, and now on file in my office, at Charleston.

"In testimony whereof, I hereto set my hand and affix the seal of said Court, at Charleston, in said District, this 5th day of April, A. D. 1889, and in the 113th year of the Independence of the United States of America.

L.S.

"JASPER Y. MOORE, *Clerk*
"*D. C. U. S., D. W. Va.*

Third, Cause:

There was no citation sued out or issued on this appeal, and there is no mention in the bond of the appellees, but R. E. Putney, Jun., & Co., and others; and the transcript of the record shows no appellee, but E. B. Knight, administrator and appellee; hence he is the only appellee; *the others appearing here as appellees under protest.*

Estis v. Trabue, 128 U. S., 225.

Fourth, Cause:

Because much of the material part of the record has not been printed. Appellees are compelled, by *certiorari*, to supply much indispensable matter, by reason of the failure of appellants.

Railway Co. v. Stewart, 95 U. S., 279.

Redfield v. Parks, 130 U. S., 623.

STATEMENT OF THE FACTS.

August 14, 1852, (page 7,) John N. Clarkson executed a deed of trust to J. J. Williams, conveying, among other properties, the 1¾-acre lot decreed to be sold in this suit. Among the debts secured by this trust deed, was a large debt of about $7,000, due James Clarkson, (page 8.) All the debts named in the trust deed, except the James Clarkson debt, are conceded, on all sides, to be paid. However this may be, this debt was *released* upon the 1¾-acre lot in controversy, by James Clarkson, the 21st July, 1858, (page 13,) and any liens now existing thereon, were obtained subsequent to the date of said trust deed. July 21, 1858, John N. Clarkson conveyed this 1¾ acres to T. B. Swann, for $250 in cash, and by payment of two judgments Clarkson held against Swann, aggregating $2,122.99, (page 12).

January, 1860, Swann conveyed a portion of this lot to E. W. Mayes, and the residue he conveyed to Mayes by a subsequent deed, January 31, 1860, excepting a small portion already conveyed to Bryant, (pages 14 and 15). June 14, 1864, Mayes conveyed it to John D. Young, (page 15).

In December, 1865, Milton Parker instituted this suit, which was a general creditors' suit, against John N. Clarkson, and its object was to convene all his creditors, and to subject all his interests, in any real estate, to the satisfaction of his liabilities. The suit was instituted in the State Circuit Court. At the time of the institution of this suit, there were very many judgment creditors of John N. Clarkson. Nearly, if not quite, all of them came into this suit, set up their liens, and had them allowed, as the record will show.

Soon after the suit began, the cause was, 10th April, 1866, referred, generally, to a master, to take, state and report the property owned by John N. Clarkson, and the liens thereon, &c., (page 25). Henry C. McWhorter, one of the master commissioners of the said court, under the practice then and still existing, took the papers to make the report; but not

having time to do so, A. T. Laidley made a report, and, on the 18th February, 1870, filed it. (Page 21, of appellant's *certiorari* record). This report was insufficient, and the cause was referred to said Laidley, who was *appointed a special commissioner for that purpose, by decree, June 21, 1870.* (Page 21, appellant's *certiorari* record). The usual notice convening creditors before the master, was published in the "Kanawha Republican." (Pages, 1, 65, 20, 21 and 22, of appellee's manuscript record for *certiorari*.)

Full notice had also been published, as required by decree of 10th April, 1866, by McWhorter, the master, who employed Laidley to make the original report, filed February 18, 1870, convening the creditors. (Pages 2 and 3, appellee's manuscript record for *certiorari*).

Meanwhile, however, McWhorter had filed a special report in the cause, upon which a decree was had, 24th November, 1869. (Pages 5 and 6, appellee's manuscript record for *certiorari*).

It will be noted that on the 6th April, 1870, a decree was taken upon the report of A. T. Laidley, filed at that term. (Pages 10, 11 and 12, appellee's manuscript record for *certiorari*).

And that, March 30, 1870, (pages 14, 15 and 16, appellee's manuscript record for *certiorari*,) at the instance of Thomas B. Swann, the most active and interested appellant here, who recognized Laidley as a commissioner, and who, too, was a party to the original bill, filed in 1865, A. T. Laidley filed a supplemental report. Whether technically a commissioner or not, it appears the court and parties acted upon his reports prior to his appointment as special commissioner, June 21, 1870.

Among the judgments set up before A. T. Laidley, as early as 1870, was that of Francis Thompson, one of the ap-appellee judgment creditors here. (Page 20, of appellee's manuscript record for *certiorari*).

And among those reported by A. T. Laidley, in his 2d report, of July 26, 1870, made by him, as special commissioner, are all

the *judgments* of the appellee's here. (Pages 37 and 68, of appellee's manuscript for *certiorari* record).

Sale of some of Clarkson's property was had by decree of 6th April, 1870, and it will be noted it was upon a report of A. T. Laidley, prior to his regular appointment as special commissioner, in June, 1870. (Pages 10, 11 and 12, appellee's manuscript record for *certiorari*).

The court, as well as all the parties, including J. D. Young, Clarkson and T. B. Swann, recognized, and acted upon the reports of Laidley, before he was appointed a special commissioner.

The cause was removed from the State Court to the District Court of the United States, for the district of W. Va., and docketed there, 21st January, 1873, and the same day it was "ordered that the report of Special Commissioner, A. T. Laidley, heretofore filed in this cause, be re-committed to him with directions to report, &c."

Special Com'r Laidley, who *had filed a report* in the cause, after he had been made a special commissioner for that purpose, by the court, (although denied by the appellants' brief,) failed to make any report under the last named decree, and the cause was referred to Commissioner Fontaine to make the report, December 24, 1873. (Pages, of original record, 23 and 24).

October 21, 1875, the court ordered the commissioner not to report any claim not properly laid before him, &c. (Page 24, original record).

October 2, 1877, Commissioner Fontaine filed his 1st report of liens &c., and, as to the 1¾-acre lot in controversy, reported every judgment lien of the appellee's. (Pages 40 and 41, appellee's manuscript for *certiorari* record).

March 14, 1876, S. A. Miller and N. Fitzhugh, attorneys for each and all of many judgment creditors, appeared before Commissioner Fountaine, and filed evidence of the judgments of all the appellees, excepting those in favor of J. H. Brown. (Pages 25 and 26, of appellee's manuscript for *certiorari* record). The appellee, J. H. Brown, had appeared

before commissioner A. T. Laidley and set up his claims. (Page 69, of appellee's record for *certiorari*.) And it was *this* report of A. T. Laidley, filed July, 1870, as special commissioner, appointed June, 1870, and *not* the original report of Laidley, filed 18th February, 1870, that Commissioner Fontaine was directed to consider in making up his report. So then, all the judgments of all the appellees, including J. H. Brown, had been properly set up before Commissioner Fontaine, and allowed against the 1¾-acre lot.

November 7, 1877, the cause was recommitted to Commissioner Fontaine. (Page 27, of original record).

October 14, 1878, Commissioner Fontaine filed his 2d report, in which he reiterated the liens of appellee's judgments. (Pages 43 and 44, of appellee's record for *certiorari*).

November 30, 1878, the cause was again recommitted to Commissioner Fontaine, with special directions to inquire into and report, as to statute of limitation with reference to claims.

March 31, 1880, Commissioner Fontaine files his 3d report, and again reports each of the appellee's judgments as valid liens upon this 1¾-acre tract of land. (Pages 60 and 61, appellee's record for *certiorari*).

January 20, 1881, the cause was again referred to Commissioner Fontaine. (Page 28, original record).

4th May, 1881, commissioner returned his 4th report. (Page 29, original record).

27th May, 1881, cause again referred to Commissioner Fontaine. (Pages 29 and 30, original record).

23d November, 1881, the court entered final decree upon Commissioner Fontaine's reports, and among the judgment liens adjudicated, are all of appellee's judgments. (Pages 31, 32 and 33, of original record).

* * * * * * * *

It will be noted that in said last decree, the fact is recited, that there was no possibility of the proceeds of Clarkson's properties reaching any claims subsequent, in priority, to

those specifically allowed in said decree as liens. And it so turned out. And so soon as this was definitely ascertained, then it was a bill of revivor was filed, April 3, 1883, (page 33, of original record,) and was filed as soon as it was ascertained that Clarkson's (the judgment debtor's) property had been exhausted, leaving our judgments unpaid. Then for the first time did we have the right to file it. Had we done so sooner, we should have been met with, and properly so, the objection that *non constat* Clarkson's property would pay all the liens, and that we were prematurely, at least, vexing his alienees, Young, Swann, &c., with a speculative suit.

We note here, that Swann was a party to the original bill, filed in 1865. So was his vendee of this property, Ezekiel Mayes, as well as his vendee, John D. Young. Swann and the heirs of Young and Mayes are parties to the bill of revivor. (Page 33, original record).

The bill of revivor was docketed, 7th May, 1883, and the answer of Swann filed, July 16 1883. (Pages 38, 39 and 40, original record).

Various demurrers were filed and overruled, (pages 40 and 41, original record,) as well as motion to strike from the docket, and also exceptions to the bill. (Page 42, original record).

Even this did not exhaust the fruitful hand of the pleader, and an amended answer was filed, 22d November, 1884, (page 43, original record,) and Jas. W. Clarkson's executor also filed answer, 26th May, 1885, (page 45, original record); again, November 4, 1885, another demurrer was filed and overruled.

It will be noticed that, December 4, 1885, a second bill of revivor was filed by the administrator of Milton Parker; but this last bill has no connection with, or relevancy to the bill filed by the administrator, at the instance of these appellees here, and relates to the Jeffries property and an other claim, and is wholly independent of our bill, and for a distinctly

different purpose, and was filed by counsel, who are personally interested in the controversy raised by our bill, as the record will show. There has never been any order or decree upon this bill of revivor, and it does not, in any wise, concern this present appeal.

T. B. Swann also filed various pleas to the bill of revivor, as did J. M. Young and J. N. Clarkson also, and answers too numerous to notice in detail. (Pages 53 to 64, inclusive.) The record shows that all of the debtor, J. N. Clarkson's property, had been sold and exhausted, and proceeds applied to the judgments prior to those of the appellee's. (See reports of sales, &c., page 77, appellee's record for *certiorari*.)

Eventually, December 12, 1885, a final deeree was entered, (pages, 49, 50, 51 and 52, original record,) ordering a sale of this 1¾-acre lot in satisfaction of the debts of appellees and others.

This, then, is a history of about twenty years litigation in the active, and unremitting prosecution of the claims of appellees, who had, early in the cause, set them up and proved them; who, time and again, had them reported favorably in some half dozen master's reports; who had successfully met and overcome various demurrers, pleas, exceptions and answers.

With a consistency that is remarkable, their liens remained, and do remain, unshaken.

It was thus, after many years of persistent effort to defeat them, that the court finally decreed them valid liens, and ordered a sale to satisfy them. And it is from this decree that the appeal brings the case into this tribunal.

BRIEF AND AUTHORITIES.

It would seem that the mere recital of the proceedings in the court below would carry with it the justice, and clear propriety of the final decree of December 12, 1885. But we shall notice some of the points raised by appellants' brief. At least so much as, in our opinion, it is material to answer.

AS TO THE REPORTS MADE BY A. T. LAIDLEY,

The first, filed Feb., 1870, was acted upon and recognized by the court and all the parties, by decree thereon, April 6, 1870. (Pages 10 and 11, of record for *certiorari*.) But the report of Laidley, which the District Court directed Commissioner Fontaine to use and refer to, by decree, 7th May, 1881, was the report made by him *after* he had been made a special commissioner, and which was filed July 26, 1870. Appellants' counsel have confounded this report with the one filed February, 1870. After this, in every instance, appellees complied with every requirement imposed by the court, as to proof of debts, and, in every instance, were their judgments, without exception, allowed and re-allowed by the master, up to the final decree. Observe the particularity required by decree of May 27, 1881, and yet unabated and intact, all of appellee's judgments were allowed by the master and by the court. They triumphed over every test.

All the way through his brief, appellant's counsel confounds these two reports of A. T. Laidley. (Brief, pages 4, 5 and 6).

It is not true that Com'r Fontaine says that none of these creditors appeared before him. Exhibit, "S. A. M.," (pages 25, 26 and 27, of record for *certiorari*,) shows Com'r Fontaine's certificate that the attorneys for the appellees appeared before him as early as March 14, 1876. The same debts had already been set up before and reported by Special Com'r A. T. Laidley, in his tabular statement filed July 26, 1870, and made by him not as a "private citizen," *but as special commissioner appointed for that purpose.*

Again, Com'r Fontaine, (pages 11 to 29, inclusive, *certiorari* of appellants,) in his report thereon, leaves no doubt as to the statute of limitation or as to sufficiency of "appearance before the *former commissioner*, A. T. Laidley." Here, too, appellant's counsel seem to confound the paper filed by A. T. Laidley, and which even was recognized by the court, with his report filed by him as a master commissioner, and is

so persistent in thus confounding them, we are compelled to reiterate and point out so often this mistake.

THE BILL OF REVIVOR.

It was filed April 3, 1883, by the adm'r of Parker, the original plaintiff, against certain judgment creditors, T. B. Swann and the several heirs of E. W. Mayes and John D. Young. (Pages 33 to 37, inclusive, original record) Among the original parties to the original bill, filed in 1865, were said Swann, E. W. Mayes, John D. Young and Francis Thompson, one of the appellee creditors. The scheme and purpose of the original bill, was to subject this very 1¾-acre lot, (original bill, pages 1 and 5, original record,) which had been conveyed to Swann with the burden of certain judgments upon it against Clarkson, which are the debts of appellees here, and notice of which the purchaser Swann had from the public records, as did his vendee, Mayes, and as did also Mayes' vendee, John D. Young. Each of them took the property with full notice and *cum onere*. Early in the progress of the cause, and responding to the original bill, as shown by tabular statement and report of A. T. Laidley *after he was appointed master commissioner for that purpose, filed July* 26, 1870, *all of appellee's judgments were set up, allowed and reported* as liens upon Clarkson's interest in real estate. Swann, Young and Mayes were all then living and were parties defendant to this suit.

THE STATUTE OF LIMITATIONS.

The bar of the statute has been attempted in every form possible by the pleadings, and each time unsuccessfully. The master was specifically ordered to report upon it in almost every one of the seven or eight orders of reference taken during nearly ten years of a litigation, mainly upon this question alone. The order of reference as early as January 21, 1873, (page 26 of original record,) required it. So the order

of May 27th, '81, (page 30, original record; page 9 amended record of appellant).

Appellants, in their brief, seem to concede the *judgments* are not barred, but claim that our bill or revivor was filed too late. Whether conceded or not, the judgments are not barred as debts against the judgment debtor, J. N. Clarkson, or as liens against his interest in real estate, owned at the time the judgments were rendered. The judgments have been kept alive in this suit, and no matter whether ten, twenty or fifty years have elapsed since their rendition, if kept alive, they are valid subsisting liens upon any interest in real estate owned by Clarkson at the date of their rendition. It is unnecessary to argue before this tribunal that judgments are kept alive by proof before a master after an order of reference convening the creditors. And it is also unnecessary to argue that so long as these judgments were kept alive they were valid and subsisting liens upon the real estate of the judgment debtor, and no conveyance could ever divest such a lien.

Code of West Virginia, chap. 139, section 5: "Every judgment for money rendered in this State heretofore or hereafter against any person, shall be a lien on all real estate of or to which such person shall be possessed or entitled at, or after the date of such judgment."

Swann took the property with full notice of these liens, as did his vendee Mayes, and as did, too, Young, the last vendee.

If no suit had ever been heretofore brought to enforce the lien of these judgments, so long as they are kept alive, by execution or otherwise, they could be enforced against the land which they bind under our statute law. All the commissioners have reported them as valid liens upon the land, and the court repeatedly adjudicated them as such under the statutes and decisions governing in this State. And they are valid against the claims of any alienee of the land. The judgment creditor does not have to concern himself to whom or how these lands may change hands. He is secure in his lien, and every one dealing with the land does so at his peril.

Mutations may occur as to the ownership of the land, but his lien once attached and kept alive, is fixed and secure against all change of ownership of the land, for all have notice of his lien, recorded and docketed upon the public records. (Code of W. Va., chapter 139, sections 6-7.)

But it is sought to plead the statute in bar as to filing the bill of revivor against the heirs of J. D. Young and others. These heirs stand in the shoes of their ancestor, who was a purchaser with full notice, as was his alienor Mayes, as well as Mayes' alienor Swann. Their ancestor was an original party, to the suit in 1865, and died in 1872, *two* years after Special Commissioner Laidley had filed his report and table of liens, July 26, 1870. He had been a party for seven years and never answered, pleaded or made any defence. *No doubt because he knew it was useless, and besides he could rely upon the general warranty of his vendor Mayes, as well as upon that of Swann to Mayes.*

A good deal is said in appellants' brief about one of the appellants, M. W. Young, holding his land as a *vendee* or *alienee* of his ancestor. There is not a particle of fact in this assertion, and nothing whatever in the record to support so reckless a statement; on the contrary, the very petition of M. W. Young, filed December 12, 1885, (page 59, original record,) distinctly says that the ancestor, J. D. Young, *died seized and possessed of the whole of said 1¾-acre lot!*

These heirs, like their ancestor, no doubt, saw the folly of contending against these liens, of which they had notice; or, like their ancestor, were content to enjoy the use, rents, and profits of the property, so long as they were permitted, and then, when they lost it, rely upon and sue on Mayes' warranty, and Swann's warranty, too.

This they can still do, and what is more, they could not have sued on the warranty until ousted, as we are now seeking to do. They were content to let well enough alone, and to let Clarkson, the judgment debtor, and Swann, the warrantor, who will finally have to respond to the Youngs, do the fighting. What would it have availed *anybody* if the

bill of revivor had been filed earlier than it was? Would it not have been demurred out of court, as prematurely harrassing them with vexatious suits, in a mere speculative litigation? For not a step could properly have been taken against the Youngs, until it was ascertained that Clarkson's property had been exhausted and left these judgment liens unpaid. It was then, for the first time, that this property held by the Youngs, as heirs of J. D. Young, could be subjected to litigation. It would not have advanced the interests of any one, or the controversy an hour, to have filed the bill of revivor before it was. We had no right to do so sooner.

How have the Youngs been injured by our not prematurely harrassing them? We could no more prematurely assail them than they now could Swann or Mayes, on their warranty deed. Have they not enjoyed the use of the property all this time? Our bill is no surprise to them; and our seeming delay, but actual restraint of the law, has in no wise injured them. No action has been had in the cause, in the interval between J. D. Young's death and the filing of the bill of revivor, that affected this property; for in Young's lifetime, Special Commissioner Laidley, had filed a report, July 26, 1870, ascertaining the lien of these judgments, and all that was done, in the said interval, was to exhaust Clarkson's property and to reiterate the lien of these judgments. After the bill of revivor was filed, a full hearing was had; answers, pleas, objections, demurrers, &c., &c., were filed, and all the rights of the Youngs respected and preserved.

Can the Youngs be permitted to take property from their ancestors by inheritance in 1872, and with full notice of these judgment liens, make deeds among themselves—for *no one to-day owns a particle of it but these same Young heirs*—live upon it, enjoy its rents and profits, sit indifferently by, with full knowledge of the liens, and let Swann and Clarkson do their fighting, and then, when finally awakened from their pretended repose, claim they were ignorant of our liens, had no notice, &c.! Can *they* charge laches upon others? May

not their *laches* be pleaded against them by Swann, when they sue him to respond to his warranty deed?

But, however this may be, we turn to

ALLEGED LACHES IN FILING BILL OF REVIVOR.

A mere glance at the record will show that there was no act of commission or omission, on the part of these appellees, that suggested laches in the pursuit of their debts. We find, as early as 1870, their debts were reported by Special Commissioner, A. T. Laidley, in his report, or table of judgments, filed July 26, 1870.

And then, in every one of the subsequent reports filed by the master, P. Fontaine, from 1873 to 1881, we find these same debts repeatedly set up, and always allowed and reported, after submitting successfully to every one of the tests the court directed the master to apply to them.

From the beginning down to the decree of December 12, 1885, these judgments were attacked, and yet, upon every point, were sustained by the master's reports, and the decrees of the court. It is seldom a court will permit or indulge the delay and obstruction that was accorded to Swann and Clarkson, who were ultimately liable upon these debts. For it is remarkable, that none of the repeated orders of reference, none of the delay, or indulgence, resulted in changing the original report by Laidley, of July 26, 1870, or of Fontaine's 1st report, as to a single debt of the appellee's.

In view of the promptness and alertness of appellees for nearly twenty years, in watching their interests, and again and again asserting and proving their debts, under every order of reference, where can the charge of laches apply? Not to them, surely. No argument could add to the logic of their action and their diligence, as shown by the record.

There was obviously, therefore, no laches upon their part, in asserting their claims. On the contrary, despite their diligence, they were vexed with persistent obstructions, placed in their way by Clarkson and Swann, who delayed

the decree, adjudicating their lien and a sale for more than ten years, when tardy justice at last was meted out to them.

The death of John D. Young was never suggested upon the record, until the bill of revivor was filed. Is not the date of filing the bill, or rather suggestion of the death, the time when the statute would commence running, or laches be considered?

It might be, that in a case like this, where judgment liens have been kept alive until the original debtor was exhausted, that the charge of laches would apply, if after the suggestion of death the case was not pushed, or diligently prosecuted. We concede, that after filing the bill of revivor, had we not diligently prosecuted our claim, (when for the first time we could properly do so,) the charge of laches might apply. Does not the record show that, so soon as Clarkson was exhausted, we filed our bill in 1883, and prosecuted it to a final decree in 1885? Everything possible was done to speed the cause and obtain our decree. Fortunately, after the statute of limitations was disposed of by the court below, the many pleas, answers, demurrers and objections, made by Clarkson, the Young heirs, and Swann, all of whom were before the court, did not delay us but a little in getting a decree of sale. From the moment we were first entitled to file our bill of reviovor, down to the decree of December 12, 1885, our claims were pressed with persistent diligence.

We think but slight authority sufficient to warrant our position. 12 Peters 164, Clark vs. Matherson. "The bill of revivor is not the commencement of a new suit, but is a mere continuation of the old." There was no abatement, but mere suspension, in this suit until it was proper to revive against the heirs of Young and Mayes.

It is claimed that the bill of revivor was improperly allowed. If this be true, the decree filing was appealable and should have sooner been appealed. This decree of revivor was entered May 7, 1883. The appeal was taken December

12, 1885. Terry vs. Sharon, 131 U. S. Rep., page 40. Was the present appeal taken in time?

We call the court's especial attention to the full and repeated hearing accorded the appellants in the court below, where they availed themselves of every pleading possible, when the court decided to entertain the bill of revivor, (pages 42 and 43 original record), and especially to the following: Answer of T. B. Swann, (page 38 original record,) which the court, (page 48,) refused to allow him to withdraw; the amended answer of T. B. Swann, (page 43 original record); demurrers Nos. 1, 2, of T. B. Swann, (pages 40, 41 original record); and third, demurrer by Swann, (page 47 original record); the exceptions of Swann and the Young heirs, (page 43 original record); the amended bill of revivor, (page 45 original record); the petition of the executor of James Clarkson, asking to be made a party, (page 45 original record); the demurrer of America Dix and others, (page 53 original record); the two separate pleas of T. B. Swann, (pages 53 and 55 original record); the plea of J. M. Young, (page 54 original record); another and third answer of T. B. Swann, filed to amended bill, (page 56 original record); the joint answer of J. M. Young and M. W. Young, (page 58 original record); the petition of the heirs of J. D. Young, (59 original record); plea and answer of John N. Clarkson, (page 60 original record,) &c., &c.

All of which will satisfy this court at a glance *that the appellants were granted the fullest hearing* and every defense availed of that could be relied upon here, and that the court filed and retained the bill of revivor only after the fullest hearing and reservation of every equitable right of the appellants. From this order of the court no appeal in time was taken. The present appeal will not avail them to correct the order on the bill of revivor.

No authority has been, nor can be, cited where the statute of limitations has ever been successfully pleaded in bar to a bill of revivor in a case similar to this. Courts of equity

are not bound by the statute. Each case must stand by itself as to staleness of claim or laches.

"Hollingshead's case, 1 Pr. Williams, 742 ; Hercy vs. Dinwoody, *idem* page 581, and 2 Vesey, Jr., p. 87, fully sustains our position, if they have *any* bearing upon the case at bar. In Hercy vs. Dinwoody, over thirty-three years had elapsed; in the case at bar less than eleven years, and during those eleven years no steps were omitted that would have availed the appellees. There is no analogy between the application of the statute to a *scire facias*, a law writ, and a court of equity's treatment of a bill of revivor, and no decision can be quoted to the contrary. Courts of equity, independently of the statute, look to staleness of claim and to laches and decide each case upon its own merits.

A court of equity will in some cases where gross *laches* are shown, or, where the *staleness* of the claim will give it no standing in a court of conscience, exercise its equitable discretion and reject it, but it will not and never does apply the rigor of the statute as at law. This bill of revivor is purely an equitable right to enforce these judgments against real estate conveyed to other parties by the judgment debtor *after* the judgments had once attached. By the practice in West Virginia, these judgment liens had to be enforced by a creditor's suit in equity; no other mode is known. *This is one of those causes purely and exclusively equitable and must be determined entirely upon the principles and rules of a court of equity regardless of any statute of limitations.* The decisions of the Court of Appeals of West Virginia upon enforcing claims in equity and construing our statute of limitations are unanimous upon this point, and we submit are of persuasive authority. There is not one single reason given for applying the bar of the statute here that is not technical and strained. 24 W. Va. Reports, page 594, Cranmer v. McSwords, where the court says: "In a suit in equity to enforce a purely " equitable demand the defense of the statute of limitations " can have no application of itself, or by analogy to any lim- " itation in courts of law. Such cases must be determined

" by courts of equity upon rules and principles of their own."

In the case above, over thirteen years had elapsed, and the court added in its opinion, that there had never been but one case in the States of Virginia and West Virginia where relief was denied within less than *fifteen* years after the cause of action arose. In the case at bar, J. D. Young, a party to the cause died in 1872, and after J. N. Clarkson, the judgment debtor, had been exhausted, the bill of revivor was filed in 1883, when for the first time any equities against Young's heirs could have been enforced.

Doggett vs. Helm, 17 Grattan 96; West vs. Thornton, 7 Gratton, 177; 7 Gratton, 112; 31 Gratton, 550; 9 Leigh, 393.

23 W. Va., page 723, Heiskill vs. Powell, where it is declared: "As to matters of equitable cognizance merely the " statute does not apply. The statute is not binding on " courts of chancery in cases of exclusively equitable cogni- " zance."

In such cases the rights of parties are enforced without reference to the statute, unless, from lapse of time and neglect in seeking their enforcement, they have become stale. Wood on Limitations, 119. Lawrence vs. Trustees, 2 Denio. (N. Y.,) 577: Where it is also held, the statute has no application in a court of equity, in a case solely cognizable in equity.

In 4th Otto., page 806, Sullivan vs. Kennebec & Portland R. R., the court in discussing laches in a court of equity says: "Every case is governed chiefly by its own circumstances." And this doctrine has universally been followed by courts of equity. There is no fixed, rigid rule that governs them, as is the case with courts at law. It is a court of conscience; it weighs all the circumstances of each case. In one case the doctrine of laches would apply, though the time was less than in another case where it would not apply. The circumstances govern each case. The discretion and conscience of a court of equity are not warped by the

technicalities of the statute, and each case, as to the staleness of the claim, or laches, must stand upon and be governed by its own circumstances. (6 Otto., 611–619. Haywood vs. Elliot National Bank).

The same doctrine is laid down in 5 Otto., 157, Brown vs. County of Buena Vista: "A court of equity applies the rule of laches according to its own ideas of right and justice—every case is governed chiefly by its own circumstances."

There are no laches in this case, nor staleness of claim. It is a claim kept alive by the greatest diligence, and prosecuted with all the vigor the law would permit.

It is suggested that the interests conveyed by some of the heirs of J. D. Young, to others of said heirs, could not be reached by a bill of revivor. Why not? Their ancestor was a party to the suit, and he died, seized of all the $1\frac{3}{4}$-acre tract, and his heirs divided it up among themselves, and some sold their interests to others, *but to no stranger*, and all the heirs and holders of the property were brought before the court by the bill of revivor.

It is claimed, too, that the petition for rehearing was not passed upon in time, and tnat the second petition, asked to be considered in the nature of a bill of review, has never been passed upon, &c., &c.; aud that it has suspended the decree. Then why this appeal? We could readily concur in the suggestion to dismiss the appeal. Let it be done.

THE "RELEASE ASSIGNMENT."

We are confronted with a novel term, "release assignment," and with a still more novel proposition. The stale pretense so often reiterated upon the hearing below, we find repeated here, viz: that the absolute release of A. W. Quarrier and James W. Clarkson (page 13 original record,) was an assignment to Swann, and therefore Swann can now assert the James Clarkson debt against this lot as a lien prior to judgments of

appellees! That is to say, that Swann could, after his warranty deed to his vendee, afterwards enforce such a claim against the property sold! The release speaks for itself. Swann wanted to buy the property, and got it released from the only trust deed debts remaining unpaid, and either overlooked the judgment debts or supposed Clarkson's property would pay these judgments and that he was safe in purchasing. But Swann's first answer filed to the bill of review answers this remarkable proposition where he says, (original record, page 39), "it was an extinguishment of his prior liens." We quite agree it "extinguished" Swann's prior liens, which he is careful not to reiterate in his second or amended answer. It will be noted that James Clarkson in releasing, did so only as to this 1¾-acre tract, and no doubt felt safe in retaining his lien upon the other property.

The Court will notice (page 42,) that Swann desired to withdraw his first answer, but was refused by the court.

RECAPITULATION.

The judgments of appellees have been kept alive in this suit, and are to-day binding against Clarkson, the judgment debtor. They attach to and bind the 1¾ acres, no matter into whose hands the title may have been transferred since they had once attached.

The judgment creditor need not concern himself as to the alienation of the land, provided he keeps alive his judgment lien, for all who afterwards acquire it take the land with notice and with the burden of his lien upon it and at his peril.

The court below repeatedly adjudicated these judgment liens when the parties were all in court.

These heirs of J. W. Young stand in the shoes of their ancestor, who was a party to the suit, and when the proper time came, they, too, were made parties.

The judgment debtor was first exhausted, and then this lot, which he had conveyed subject to these liens, was decreed against. No *personal* decree is sought against the Young

heirs. It is a proceeding *in rem*. The case might be different were we asking a personal decree.

The statute of limitations cannot avail as against the judgments; nor as to bill of revivor. No laches have been shown. The debts have been for many years diligently asserted and subjected to every test, and the court below has so decreed; and we confidently submit that this court will affirm the decree of December 12, 1885.

S. A. MILLER and
J. F. BROWN,
For the Appellee,
E. B. KNIGHT, Adm'r of Milton Parker,
And for BABBITT, GOODE & CO.,
PUTNEY & NORTON,
R. E. PUTNEY, JR., & CO.,
FRANCIS THOMPSON,
J. H. BROWN, who appear as appellees under protest.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. ~~542~~. 75

L. N. YOUNG ET AL., APPELLANTS,

vs.

E. B. KNIGHT, ADMINISTRATOR OF MILTON PARKER, DECEASED, APPELLEE.

The Petition and Motion for Certiorari of E. B. Knight, Administrator of Milton Parker, Deceased, Appellee.

To the Honorable the Chief Justice and the Associate Justices of said Court:

Your petitioner, the undersigned, appellee in the above cause, respectfully prays and moves your honorable court to award him a writ of *certiorari* to the district court of the United States for the district of West Virginia, sitting at Charleston, in said district, commanding the judge of said district court to certify to your honorable court what omissions, to the extent hereinafter enumerated, may be found in the record of proceedings in said cause sent up to your honorable Court by the clerk of said district court at the instance of the appellants in said cause, and petitioner now

says that a part of the record in this cause, the evidence, orders, commissioner's reports, judgments, petitions, &c., have been from mistake or other cause improperly omitted from the certified record sent up to the said Supreme Court under the certificates of the clerk of said district court, as are set forth in the notice duly served and hereto attached as part hereof, to wit:

(1) Deposition of H. C. McWhorter, extract from Exhibit "J. A. E."

(2) Deposition of —— Merrill, page 82 of depositions.

(3) Decree of Kanawha circuit court of Nov. 24, 1869.

(4) Letter of John N. Clarkson to A. Miller of Nov. 16, 1867.

(5) Decree of Kanawha circuit court of April 6, 1870.

(6) Report of commissioner named in decree of April 6, 1870, and also report of A. T. Laidley, filed February 19, 1870.

(7) Copy of bond taken in this cause on the appeal now pending.

(8) Decree of Kanawha circuit court of April 15, 1871.

(9) Decree of Kanawha circuit court of July 7, 1871.

(10) Exhibit "A. T. L. No. 2," filed before Commissioner Fontaine.

(11) Printed notice of A. T. Laidley and John Slack, Sr., clerk, &c., as directed by decree of June 21, 1870.

(12) Deposition of Thos. B. Swann, dated October 4, 1878.

(13) Exhibit "S. A. M," filed March 14, 1876, before Commissioner Fontaine.

(14) Supplemental statement of A. T. Laidley, Exhibit "A. T. L. No. 5," filed March 30, 1876.

(15) Special report of A. T. Laidley, filed June 22, 1870.

(16) Decree of October 21, 1875.

(17) Commissioner Fontaine's report, pages 115 and 116, filed Oct. 22, 1877.

(18) Decree of Nov. 7, 1877.

(19) Commissioner Fontaine's second report, filed Oct. 14, 1878, pages 4 and 5.

(20) Commissioner Fontaine's third report, dated March 12, 1879, pages 13, 14, 2, 3, 4, 5, 6, 7, 20, 21, 103, and 104.

(21) Printed notice at beginning of Commissioner Fontaine's third report.

(22) A. T. Laidley's report, filed Nov. 29, 1870, the first and concluding pages.

(23) Deposition of J. H. Brown, of Oct. 3rd, 1881, Exhibit "J. H. B."

(24) Commissioner Fontaine's 5th report, pages 30 and 31.

(25) Exhibit "A. T. L. 50."

(26) H. C. McWhorter's report of Nov'r 20, 1869.

(27) Tables accompanying report of H. C. McWhorter, the heading of report and judgments in tables Nos. 1 and 2 of J. H. Brown, Francis Thompson, Putney & Norton, R. E. Putney, Jr., & Co., Babbitt, Goode & Co., Hedrick for Parker, and Milton Parker.

The *facts* upon which this motion is made are these:

1st. All and each of the above-mentioned proceedings, &c., are essential and material to a proper hearing of the appeal in this cause in your honorable Court.

2nd. Neither the appellee in this cause and petitioner, E. B. Knight, administrator of Milton Parker, deceased, nor his attorneys, *had any notice* whatever of appellants' motion for a *certiorari*, on which motion your honorable Court, on the 23rd January, 1889, awarded a *certiorari* to appellants, and said petitioner and appellee thus had no opportunity to require or insist upon the appellants taking up a proper and sufficient record, which the appellee is now compelled to do.

3rd. The appellee but comparatively recently had a copy of the *certiorari* awarded to the appellants here, and thus appellee is compelled to move the court to award a *certiorari*

for a sufficient record, which the appellant in the first instance should have taken up, and which appellants have not done, even in their *certiorari* awarded them January 23, 1889.

All of which is respectfully submitted.

E. B. KNIGHT,
Adm'r of Milton Parker, Dec'd, and Appellee,
By his Counsel.

S. A. MILLER and
J. F. BROWN,
Counsellors for the Appellee and Petitioner.

STATE OF WEST VIRGINIA, }
Kanawha County, } *to wit:*

D. C. Gallaher on oath says that he was of counsel in the above cause in the United States district court for district of West Virginia, and that the facts stated in the above motion to award a *certiorari* to appellee are true.

D. C. GALLAHER.

Subscribed and sworn to before me, in my said county, this 7th May, 1889.

Given under my hand and official seal this 7th May, 1889.

[SEAL.]

GEO. S. COUCH,
Notary Public.

SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1888. No. 342.

L. N. YOUNG, M. W. YOUNG, J. M. YOUNG, H. SLACK, and A. DIX, Heirs-at-Law of J. D. Young, Deceased; J. N. Clarkson, and Thos. B. Swann, Appellants,

against

E. B. KNIGHT, Administrator of Milton Parker, Deceased, Appellee.

Notice.

The appellants in the above-entitled cause, now pending, will and each of them will take notice that on the 13th day of May, 1889, during the October term of 1888, the undersigned, appellee in said cause, will move the said Supreme Court to award him a writ of *certiorari* upon suggestion of a diminution of the record and proceedings of said cause, to wit, that a part of the record in this cause, the evidence, orders, commissioner's reports, judgments, petitions, &c., have been from mistake or other cause omitted improperly from the certified record sent up to the Supreme Court under the certificates of the clerk, to wit:

(1) Deposition of H. C. McWhorter, extract from Exhibit "J. A. E."

(2) Deposition of —— Merrill, page 82 of depositions.

(3) Decree of Kanawha circuit court of November 24, 1869.

(4) Letter of J. N. Clarkson to S. A. Miller of November 16, 1867.

(5) Decree of Kanawha circuit court of April 6, 1870.

(6) Report of commissioner named in decree of April 6, 1870, and also report of A. T. Laidley, filed February 19, 1870.

(7) Copy of bond taken in this cause on the appeal now pending.

(8) Decree of Kanawha circuit court of April 15, 1871.

(9) Decree of Kanawha circuit court of July 7, 1871.

(10) Exhibit "A. T. L." No. 2, filed before Commissioner Fontaine.

(11) Printed notice of A. T. Laidley and John Slack, Sr., clerk, &c., as directed by decree of June 21, 1870.

(12) Deposition of Thos. B. Swann, dated October 4, 1878.

(13) Exhibit "S. A. M.," filed March 14, 1876, before Commissioner Fontaine.

(14) Supplemental statement of A. T. Laidley, Exhibit "A. T. L. No. 5," filed March 30, 1876.

(15) Special report of A. T. Laidley, filed June 22, 1870.

(16) Decree of October 21, 1875.

(17) Commissioner Fontaine's 1st report, pages 115 and 116, filed October 2, 1877.

(18) Decree of November 7, 1877.

(19) Commissioner Fontaine's 2d report, filed October 14, 1878, pages 4 and 5.

(20) Commissioner Fontaine's 3d report, dated March 12, 1879, pages 13, 14, 2, 3, 4, 5, 6, 7, 20, 21, 103, and 104.

(21) Printed notice at beginning of Commissioner Fontaine's 3d report.

(22) A. T. Laidley's report, filed November 29, 1870, the first and concluding pages.

(23) Deposition of J. H. Brown of October 3, 1881, Exhibit "J. H. B."

(24) Commissioner Fontaine's 5th report, pages 30 and 31.

(25) Exhibit "A. T. L. 50."

(26) H. C. McWhorter's report of November 20, 1869.

(27) Tables accompanying report of H. C. McWhorter, the heading of report and judgments on tables Nos. 1 and 2 of J. H. Brown, Francis Thompson, Putney & Norton, R. E.

Putney, Jr., & Co., Babbitt, Goode & Co., Hedrick for Milton Parker, and Milton Parker.

E. B. KNIGHT,
Adm'r of Milton Parker, Deceased, Appellee.

S. A. MILLER & J. F. BROWN,
Counsellors for said Appellee.

STATE OF WEST VIRGINIA, } *To wit:*
Kanawha County, }

D. C. Gallaher, being duly sworn, says that he served a copy of the above notice upon Thos. B. Swann, counsel of record in above cause pending in U. S. Supreme Court, by handing to him, in Charleston, Kanawha county, West Virginia, a true copy thereof on the *4th day of May*, 1889.

D. C. GALLAHER.

Subscribed and sworn to before me, in my said county, this 6th day of May, 1889.

Given under my hand and official seal this 6th May, 1889.

[SEAL.]

E. W. KNIGHT,
Notary Public.

(Endorsed:) Supreme Court U. S. 1888, October term. No. 75. L. N. Young *et al.*, app'ts, *vs.* E. B. Knight, adm'r, &c. Suggestion of diminution of record and motion for writ of certiorari on part of appellees and notice and affidavit. Filed May 10, 1889.

SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1889. No. 75.

L. N. YOUNG & *als. vs.* E. B. KNIGHT, Adm'r, &c.

To L. N. Young, M. W. Young, J. M. Young, H. Slack, and A. Dix, heirs-at-law of J. D. Young, deceased, and John N. Clarkson, and Thos. B. Swann:

You and each of you will take notice that in the above cause, now pending in the Supreme Court of the United States by virtue of an appeal, I shall move the said Court, on the 21st day of October, 1889, to award a writ of *certiorari* to the judge of the circuit court of the United States for West Virginia upon a suggestion of diminution of the record and proceedings of said cause, and that a part of the record in this cause—the evidence, orders, commissioner's reports, judgments, petitions, &c.—has for some cause been omitted from the certified record sent up to the Court under the certificate of the clerk, to wit:

(1) Extract of deposition of J. S. Merrill and part of Exhibit "J. A. E."

(2) Extract of deposition of H. C. McWhorter and part of Exhibit "J. A. E."

(3) Decree of Kanawha circuit court of November 24, 1869.

(4) Letter of J. N. Clarkson to S. A. Miller, dated November 16, 1867.

(5) Decree of Kanawha circuit court of April 6, 1870.

(6) Report of Commissioner A. T. Laidley, dated March 30, 1870.

(7) Exhibit "A. T. L. 2," filed before Commissioner Fontaine.

(8) Notice for account directed by decree of June 21, 1870.

(9) Exhibit "C," deposition of T. B. Swann, filed before Commissioner Fontaine.

(10) Exhibit "S. A. M.," filed March 14, 1876, before Commissioner Fontaine.

(11) Special report of A. T. Laidley, filed June 22, 1870.

(12) Decree of October 21, 1875, by U. S. district court.

(13) Abstract from Commissioner Fontaine's 1st report as to liens on the 1¾-acre tract.

(14) Decree of United States district court, 7th November 1877.

(15) Abstract from Commissioner Fontaine's 2nd report, filed October 14th, 1878, from the words in said report, "By the third clause of the said decree being required to report" to the words "the liens created by deeds of trust upon the lands of the defendant, John N. Clarkson."

(16) Abstract of Commissioner Fontaine's 3rd report filed March 31, 1880, from the words "On November 5, 1851, by deed of that date, Van B. Donnally and wife, &c.," to the words "the aforesaid land is now owned and held by the said John D. Young."

(17) Notice of Commissioner Fontaine for restating account, as directed by decree of November 30, 1878.

(18) Abstract from 3rd report of Commissioner Fontaine filed March 31, 1880, from the words "And the commissioner is required in making up his report to report separate to itself, &c.," down to and including the liens and priorities upon the 1¾-acre tract and to the words, inclusive, "the sale of said parcel of land made to Thomas B. Swann, as described at page 13, *ante*, was made subject to all of the foregoing liens and to no others."

(19) Bond given for appeal, dated 12th day of December, 1885.

(20) Abstract of report of A. T. Laidley, dated July 26, 1870, from the beginning to the words "were disturbed by the giving of a deed of trust."

(21) Abstract from tables No. 1 and 2 and accompanying the foregoing reports and account of July 26, 1870, from the

words "Tables showing all the unsatisfied judgments, &c," setting forth the judgments of all the appellees.

(22) Deposition of J. H. Brown, taken 3rd October, 1881.

(23) Abstract from Exhibit "A. T. L. 50," being the report of H. C. McWhorter, commissioner, and exceptions thereto by R. E. Putney, &c.

(24) Abstract from 5th report of Commissioner Fontaine, filed October 19, 1881, from the words "3rd report, page 40," to the words "is not barred by the statute of limitations."

(25) Decree of circuit court of Kanawha, 15th day of April, 1871, recommitting cause to Commissioner Laidley for a report.

(26) Trial report of Special Commissioners Mallahan, Miller, and others, and decree thereon, May 9, 1885.

CHARLESTON, W. Va., *September* 14, 1889.

L. H. EWART,
Administrator of Milton Parker, Deceased,
By W. A. MILLER & J. F. BROWN,
Attorneys.

We hereby accept service of the above notice for application for a writ of *certiorari* this 14th day of September, 1889.

T. B. SWANN,
Attorney for Appellants.

MEMO.—This motion was made for last term, but not acted on. The attention of the court is respectfully called to appellants' brief filed at last term in resistance to their motion for a *certiorari*.

Respectfully,

T. B. SWANN,
Attorney for Appellants.

IN THE SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1889. No. 75.

M. W. YOUNG *et als.*, Appellants,

vs.

E. B. KNIGHT, Administrator of Milton Parker, Deceased (Revived in the Name of L. H. Ewart, Administrator of Milton Parker), Appellee.

To the Hon. Judges of the said Court:

The undersigned respectfully shows unto this honorable Court that at the October term, 1888, the above cause was upon the docket, with E. B. Knight, administrator, &c., as appellee; that since then he has learned of a motion to revive in the name of your petitioner, the undersigned, as appellee; that notice was given a writ of *certiorari* would be applied for on the 13th day of May, 1889, but the Court adjourned without acting thereon because not called to the Court's attention in time; that the record originally brought up to this Court from the court below, as well as that additional portion brought up by the appellants by a *certiorari*, is still grossly defective and lacks much of the most material part of the proceedings below. Indeed, no proper hearing can be had upon the fragmentary and mutilated record now before the Court; that a part of the record in this cause, the evidence, orders, commissioner's reports, judgments, petitions, &c., have from some cause been omitted by the appellants from the certified records sent up to the Court under the certificate of the clerk, namely, those parts thereof as are set forth in the notice hereto attached and made part hereof as Exhibit "A;" all and each of which parts of the record are essential and necessary to a proper hearing of the cause.

The undersigned respectfully refers to and asks to be read with this application his former application, wherein reasons